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# THE CIVIL RIGHTS ACT OF 1984—S. 2568

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# HEARING

BEFORE THE

## COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

INVESTIGATING THE POSSIBLE EFFECTS THE CIVIL RIGHTS ACT OF 1984 (S. 2568) WILL HAVE ON THE AGRICULTURAL COMMUNITY

JUNE 12, 1984

Printed for the use of the
Committee on Agriculture, Nutrition, and Forestry

U.S. GOVERNMENT PRINTING OFFICE
39-371 O
WASHINGTON : 1984

5161-39

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# THE CIVIL RIGHTS ACT OF 1984—S. 2568

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TUESDAY, JUNE 12, 1984

U.S. Senate,
Committee on Agriculture, Nutrition, and Forestry,
*Washington, DC.*

The committee met, pursuant to notice, at 10:05 a.m., in room SR-328A, Russell Senate Office Building, Hon. Jesse Helms (chairman of the committee), presiding.

Present: Senator Helms.

## STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM NORTH CAROLINA

The Chairman. The committee will come to order.

Today this committee will review the potential impact of the proposed Civil Rights Act of 1984 upon American farmers and ranchers and our agricultural community in general. Now, the Chair would stress that this is purely an oversight hearing. It is for the purpose of taking testimony in a formal way so that it can become an official part of the record.

It is timely inasmuch as the Senate Committee on Labor and Human Resources is scheduled to begin markup on the bill tomorrow morning.

Now, proponents of S. 2568, the legislation in question, claim that the bill addresses only the Supreme Court's recent decision in the case of *Grove City College* v. *Bell.* However, many, including this Senator, believe this bill breaks new ground and will significantly expand current laws that address Federal civil rights enforcement.

If we find that the bill does indeed expand the jurisdiction of the Justice Department, then I feel that our agricultural constituency should at least know how they will be affected.

Several days ago I received a letter about S. 2568 from a distinguished North Carolinian, my good friend Sam Ervin, who served the people of North Carolina and the Nation with great distinction during his tenure in the U.S. Senate.

I have often said that I do not move a peg on constitutional questions or intricate legal questions without consulting Senator Ervin and other distinguished legal scholars because I am not a lawyer.

Senator Ervin's views and expertise on our Constitution are respected by all. Now, the chronology of it is that I wrote to Senator Ervin on May 21, asking his views on S. 2568. And without objection, Senator Ervin's letter will be made a part of the record.

[The letter referred to above from former Senator Ervin follows:]

MORGANTON, NC, *May 24, 1984.*

Hon. JESSE HELMS,
*U.S. Senator,*
*Washington, DC.*

DEAR JESSE: I have your letter of May 21. My views in respect to S. 2568 are in harmony with yours.

I have just completed revising for publication an autobiography entitled "Preserving The Constitution". One of the remarks I make in it describes with accuracy this proposed legislation.

The most serious threat to good government and freedom in America is not posed by evil-minded men and women. It is posed by legislative and judicial activists and other sincere persons of good intentions who are bent on remaking America without delay in the image of their own thinking. They lack faith in the capacity of people to be the masters of their own fates and the captains of their own souls, and insist on government assuming the task of controlling their thoughts and managing their lives. They forget that freedom is political power divided into small fragments, and insist a highly centralized federal government perform this task. They ignore the wise observation of a wise North Carolinian, Asa T. Spalding, Sr., of Durham, that he who wishes to drink the cooling waters of the spring on the mountaintop must undergo the exertion of climbing the mountain, and insist on civil rights laws which bestow benefits on minorities on the basis of race rather than merit. Their impatience and zeal will not brook the delay of seeking amendments to the Constitution to legitimate their aims. In consequence, they do constitutional evil to accomplish without delay the ends they cherish.

If these sincere legislative and judicial activists and the confederates have their way, good government and freedom will vanish from our land.

In addition, this legislative proposal would visit the sin of the guilty upon all of the innocent.

Sincerely yours,

SAM J. ERVIN, JR.

The CHAIRMAN. But let me read just a portion of Senator Ervin's letter. I quote him: "The most serious threat to good government and freedom in America is not posed by evil-minded men and women. It is posed by legislative and judicial activists and other sincere persons of good intentions who are bent on remaking America without delay in the image of their own thinking."

Then the Senator went on to say, "They ignore the wise observation of a wise North Carolinian, Asa T. Spalding, Sr., of Durham, that he who wishes to drink the cooling waters of the spring on the mountaintop must undergo the exertion of climbing the mountain."

From the preliminary information we have received thus far, it appears that this legislation does have the potential to bring under the regulation of the civil rights laws a large portion of all—and I stress that word, "all"—private sector activity.

It is possible that as a result of this legislation, if enacted, farmers and ranchers may find themselves burdened with additional Federal rules and regulations, and Lord knows we have enough of those already. They may also find themselves as potential defendants in thousands of lawsuits arising from employment practices, credit, marketing and other activities that could be construed by some as covered by this legislation.

In view of this, it seems to me that this legislation deserves the fullest possible consideration before enactment is contemplated. Now, we are not here today to condemn or defend the activities of farmers or ranchers or anybody else in the area of civil rights. Instead, we are here to determine what effects this legislation will have on our farmers and ranchers and the agricultural community in general.

Now, I believe that it is best to determine what it is that we are doing before we do it. We have a fine list of witnesses and after hearing from any other Senators who may appear, I will call upon the Honorable Dan Oliver, the general counsel for the U.S. Department of Agriculture.

At this point, let me inquire if any Senators are on the way.

[No response.]

The CHAIRMAN. I judge not, so we will proceed. We do have a statement from Senator Roger Jepsen which we will make a part of the record.[1]

Mr. Oliver, if you will proceed and come here and sit in the chair of Mr. Dole, who is participating in a conference this morning. I welcome you, sir. You may proceed.

### STATEMENT OF HON. DANIEL OLIVER, GENERAL COUNSEL, U.S. DEPARTMENT OF AGRICULTURE

Mr. OLIVER. Mr. Chairman, it is a pleasure to appear before your committee again. I welcome this opportunity to present my views on S. 2568, entitled the "Civil Rights Act of 1984."

Mr. Chairman, President Reagan and this administration, as you do know and all should know, are committed to the principles of nondiscrimination and equal opportunity. Those principles and this administration's commitment to them, and efforts on behalf of them, have been eloquently described by others, especially by the Honorable Wm. Bradford Reynolds, the distinguished Assistant Attorney General for the Civil Rights Division. That commitment is not in dispute here—is not in dispute anywhere where serious people are gathered together—and I will say no more about it, except that I am heartily in concurrence with it.

Mr. Chairman, S. 2568 was introduced following the Supreme Court's decision in the *Grove City* case. *(Grove City College* v. *Bell,* 104 S. Ct. 1211 (1984).) The stated purpose of the bill is, as I understand it, to reverse only a single holding of that decision specifically, the Court's holding that the law prohibiting discrimination on the basis of gender—title IX of the Education Amendments of 1972—prohibits such discrimination only in programs or activities receiving Federal financial assistance.

Some have said that that reading of the law—which I will call the program-specific reading—and I should add here that the laws prohibiting discrimination on the grounds of race, handicap, and age have the same provision—some have said that that program-specific reading represents a new interpretation of the antidiscrimination laws.

I believe that is not so. Every Federal court of appeals that has considered the issue has adopted the program-specific reading—every court, that is, except the Third Circuit, in the *Grove City* case. And, of course, the Third Circuit was overruled by the Supreme Court.

But more important for our purposes here this morning, Mr. Chairman, the statutes' focus on activities receiving Federal financial assistance rather than on recipients of that assistance is the basis of the Department's current and longstanding view that these antidiscrimination laws are concerned not with the activities of the ultimate beneficiaries of Federal financial assistance, but with the activities of the groups and individuals through which the Government works to provide assistance to those ultimate beneficiaries.

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[1] See p. 35 for the prepared statement of Senator Jepsen.

This understanding of many years is reflected in the regulations of the Department of Agriculture and of other agencies implementing the Federal antidiscrimination laws. Specifically, the regulation defining "recipient" excludes from that definition the ultimate beneficiaries of a program or activity (7 CFR 15.2(e)).

It is important to note that this specific exclusion of ultimate beneficiaries is not grounded in any statutory definition of a recipient of Federal financial assistance or in any other specific statutory exclusion. It is grounded in the fact that the antidiscrimination statutes are directed at programs or activities receiving Federal financial assistance and therefore appear not to be directed at the ultimate beneficiaries of the assistance under those programs.

S. 2568 would amend title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973 [section 504], and the Age Discrimination Act of 1975 to prohibit discrimination by recipients of Federal financial assistance rather than discrimination in programs and activities receiving Federal financial assistance. If this legislation is enacted, it appears doubtful that the current exclusion of ultimate beneficiaries from the definition of recipients of Federal financial assistance could be continued. Indeed, from the proposed bill's tracking of all the language of the present regulation defining a recipient, except that portion relating to the ultimate beneficiary, it seems entirely fair to infer a legislative intent to preclude continuation of the exemption of the ultimate beneficiary, and I certainly would not be surprised if a court made that inference.

The definition in the proposed bill of a recipient is as follows:

> (A) Any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> (B) Any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity of any such subunit, to which federal financial assistance is extended (directly or through another entity or a person),
>
> Or which receives support from the extension of Federal financial assistance to any of its subunits.

I realize, Mr. Chairman, that some people may say that that definition of a recipient of Federal financial assistance does not, could not, and was not intended to, include a farmer. I suggest, nevertheless, that that language could indeed include a farmer.

In the first place, it is not clear what is meant by the word "entity" contained in section (A) of S. 2568's definition of a recipient.

Let us take the case of a farmer program loan, extended directly to a farmer by the Farmers Home Administration. Currently, the antidiscrimination laws do not apply to farmer program loans, because the farmer is considered to be the ultimate beneficiary. Under the proposed bill, however, there is no exclusion for ultimate beneficiaries, and it is at least plausible to say that the farmer is included within the bill's definition of a recipient of Federal financial assistance.

Cannot a farmer be an entity? And even if a farmer in his individual capacity is not an entity—and I am not sure he is not—what about his farming operation? What if that operation is a huge corporation, employing hundreds of people—is that not an entity within the meaning of the statute? S. 2568 is sufficiently ambiguous to leave unresolved whether or not the farmer or his operation would be a recipient under the proposed definition.

Mr. Chairman, in addition to there being a real possibility of a farmer's being included within section (A) of the definition of recipient contained in the proposed bill, there is also a real possibility that some farmers will be included within section (B) of that definition.

Let us consider, for example, a tobacco farmer. All tobacco price support loans are provided to farmers through producer associations. These associations are, even now, considered by the Department of Agriculture to be covered by the antidiscrimination laws. They are the recipients of the Federal financial assistance being provided, but they are not the ultimate beneficiaries of that assistance. Therefore, their price support activities are subject to the prohibitions of the Federal antidiscrimination laws. The individual tobacco farmer, himself, however, is not currently considered to be covered by those laws, because it is he who is considered to be the ultimate beneficiary of the Federal financial assistance.

Under the proposed bill, however, I believe such a tobacco farmer might be subject to the antidiscrimination laws. Under section (A) of the proposed bill's definition of a recipient, the producer association would almost certainly be a recipient. It is certainly a "private" * * * "organization" * * * "to which Federal financial assistance is extended." And under section (B), because the farmer would seem to be a transferee of the cooperative or association, he might also be a recipient. It certainly would not be an unreasonable interpretation to say he was a recipient.

Now, Mr. Chairman, let us consider some of the people and business organizations—dare we call them "entities"—the farmer does business with.

Let us return to our farmer who received a Farmers Home Administration loan, and let us suppose he puts half of the money in a bank, and spends the other half on fertilizer, and a tractor. It is not at all clear that the bank, the seller of the fertilizer and the seller of the tractor are not covered by the definition of recipient contained in the proposed bill. I believe the bank and the farmer's input suppliers could be covered by this bill if Grove City College is meant to be covered by the bill's definition. The only Federal funds Grove City College received, it received from students who had obtained grants from the Federal Government. If those funds retain the characteristic of being Federal assistance even after they leave the students' hands, why won't the funds lent to a farmer retain that same Federal assistance characteristic when the farmer pays them to the tractor salesman, or when he stores them in the bank? If those funds remain assistance, then those funds are "Federal financial assistance" that is being "extended" to a "private organization,"—the bank or tractor seller,—"through" "a person,"—the farmer—and the banker and tractor seller become recipients.

Mr. Chairman, let me hasten to add that I assume the sponsors of this bill intend that the colleges to which the students pay over their grants will be covered by the laws that this bill would amend. But we have a paradox here. What I don't understand is how these laws, if they are amended by S. 2568, will cover colleges but not a farmer's bank or the stores where he buys his fertilizer or tractor.

Finally, Mr. Chairman, let me say that if the American farmer and the people he does business with—his banker, his input suppliers, his implement dealers—are meant to be covered by the Federal antidiscrimination laws by reason of this amendment to them, I believe the enforcement effort the Department of Agriculture would have to mount would be staggering. I have no idea how it would be performed, and I am not prepared to discuss it here this morning. I would say only that if the Department is to take on an obligation of that magnitude, policing every farmer and every person he does business with, Congress should ask it to do so in a more explicit manner than is contained in this proposed bill.

In concluding, Mr. Chairman, I should like to note that despite extensive debate on the floors of the House and Senate over the meaning of certain portions of title IX, including specifically the program and activity language, there remains today—even after the Supreme Court's decision in *Grove City*—disagreement on what it was that Congress intended by that language. Clearly some of the language in S. 2568 is also ambiguous. Under the circumstances, it would seem wise to take enough time fully to consider the language and implications of such a sweeping proposal, and to take the care to craft such a proposal with sufficient precision that another generation of lawyers and their clients will not have to guess at its meaning.

Now, Mr. Chairman, I would be happy to try to answer any questions you may have.

The CHAIRMAN. Mr. Oliver, I appreciate your coming here this morning. I was following your testimony as you read it and it is difficult to present testimony where you have so many quotes, but you did it admirably.

Let me give you an example of my concern about the ambiguity of this bill and the far-reaching potential implications. I will cite a case involving the University of North Carolina.

There were allegations that the university had violated a title of the Civil Rights Act. Just this past February, I believe it was, the Supreme Court finally let stand a settlement that some of us had worked on for months between the University of North Carolina, myself, the Department of Education, and the Civil Rights Division at the Justice Department.

I am telling you, Dan, I was on the phone, I will bet you, 100 hours with Bill Friday, who is president of the consolidated university down there, and Ted Bell and the people at the Justice Department, as late as 2 in the morning.

We finally hammered out a settlement, and then that was appealed and challenged. Now, Bill Friday pointed out that the controversy that we finally got settled, and which the Supreme Court upheld, I believe, last February, had gone on for 13 years.

Do you want to guess how much it cost the taxpayers of North Carolina to just settle that one point?

Mr. OLIVER. No, I do not.

The CHAIRMAN. $100 million, according to estimates, trying to comply with the Government's demands.

Now, I have seen criticism of anybody even challenging this bill, but surely we need to know what it is we are getting into, if I can mix a metaphor, before we go over the cliff again.

The case involving the University of North Carolina was a combination of bureaucratic regulation and Federal litigation, and all that sort of thing, which, by your statement, you are saying, in effect, we may be going again.

Now, you pretty well covered it, but just for the clarity of the record, in case you want to amplify, how does S. 2568 enlarge the scope of those organizations and enterprises, particularly within the farming and agricultural community, that would be subject to the same type of Federal intervention as I described with the University of North Carolina?

Mr. OLIVER. Well, Senator, I think the effect of S. 2568 would be, as I indicated in my testimony, to bring within the coverage of the antidiscrimination laws the farmer and essentially the people he does business with. For example, in the case of a Farmers Home loan which is extended to the farmer, I think that that loan could bring him within the coverage of these bills.

I think, also, it could bring within that coverage the people he does business with. That would subject them to these laws and it would subject the Department of Agriculture to obligations to enforce the laws.

The CHAIRMAN. Well, I think I asked you the question too broadly. How about marketing orders? Would there be an implication that this bill covers that?

Mr. OLIVER. I am not sure it would cover marketing orders. I think it would cover Federal crop insurance.

The CHAIRMAN. How about storage payments?

Mr. OLIVER. I do not know the answer to that, Senator. It might cover storage payments.

The CHAIRMAN. Disaster loans?

Mr. OLIVER. I suspect it would cover disaster loans.

The CHAIRMAN. Do you see what we are getting into? Dairy price supports?

Mr. OLIVER. Dairy price supports are a bit more difficult. I am not sure about dairy price supports; I am simply not sure about dairy price supports.

The CHAIRMAN. Well, neither am I, you see, and I think this is what we must study. I am sure that Orrin Hatch and his committee will be very diligent about that, and there are some other Senators popping up here and there who are going to be diligent about raising questions.

I guess that is about it. What I am going to, Dan, in the interest of time is to submit some questions in writing.

Mr. OLIVER. I will be happy to respond.

The CHAIRMAN. I want you to think about the marketing orders and the storage payments and all the rest. I realize I sort of threw that at you blind-sidedly. I did not mean to do that, but I think that ought to be introduced so that we can consider the whole nine yards.

This is probably an unfair question because we are plowing new ground here; this is the Agriculture Committee, so I will use that metaphor. If this bill expands the scope of current laws, do you have any idea how much the increased costs would be? I am talking about just the agricultural sector now.

Mr. OLIVER. I do not have a dollar figure.

The CHAIRMAN. Of course you do not.

Mr. OLIVER. But I would think that the requirements for compliance involved would certainly be a cost both to the farmer and to the Department of Agriculture.

The CHAIRMAN. And the consumer and the taxpayer.

Mr. OLIVER. Certainly.

The CHAIRMAN. Here we go again. It cost the University of North Carolina $100 million over a 13-year period. It staggers the imagination to even begin to estimate what it would cost the Department of Agriculture for the things over which it has purview.

Well, the staff has prepared several questions, none of which you are prepared to answer this morning because you have got to study. So allow me the privilege, if you will, of submitting the questions in writing, and they will become a part of the official record.

Mr. OLIVER. Yes, sir.

The CHAIRMAN. We do appreciate your coming here this morning. Thank you very much.

Mr. OLIVER. Thank you, Senator.

[The following material was subsequently received for the record:]

### WRITTEN QUESTIONS SUBMITTED BY SENATOR JESSE HELMS TO DANIEL OLIVER, GENERAL COUNSEL OF USDA, AND ANSWERS THERETO

*Question 1.* Please detail for the Committee the activities or programs conducted by the USDA that currently are covered by anti-discrimination laws?

Answer. Federal anti-discrimination laws currently apply to all programs or activities receiving Federal financial assistance under any program administered by the U.S. Department of Agriculture ("USDA"). The following programs are among those covered:

Agricultural price support and production control programs, including price support loans, diversion payments, disaster payments, and deficiency payments; storage facility loan program; agricultural conservation program; dairy indemnity program; Federal crop insurance program; food stamp program; school lunch program; school breakfast program; child care food program; special milk program; summer food service program; commodity distribution programs; special supplemental food program for women, infants and children; Federal grants for agricultural research; direct and insured loans made by the Farmers Home Administration ("FmHA"), including farm real estate loans, farm operating loans, disaster loans, commodity facilities loans, and rural housing loans; rural housing and rural development grants; and direct loans made by the Rural Electrification Administration ("REA") to rural electric and telephone cooperatives.

It should be noted, however, that it is only the programs (and activities) that are covered. The "ultimate beneficiaries" under those programs are not currently covered. They are specifically excluded by the Department's regulations.

*Question 2.* How would S. 2568, if enacted in its present form, broaden current anti-discrimination laws and what programs at USDA would be brought under coverage:

Marketing Orders? Storage Payments? Disaster Loans? Dairy Price Supports? Crop Insurance? Other programs?

Answer. It appears to us that S. 2568, if enacted in its present form, would broaden the application of Federal anti-discrimination laws in two important ways. First, the statutes, if they were amended by S. 2568, would cover all activities of the recipients, rather than reaching only those programs or activities of a recipient to which Federal financial assistance is being extended. Second, the definition of a recipient of Federal financial assistance for purposes of this prohibition provides no exemption from coverage for the ultimate beneficiary of the assistance, as well as, perhaps, the people with whom he deals, which is a departure from existing law.

This Department administers a number of programs under which it provides Federal financial assistance directly to program ("ultimate") beneficiaries, who, in accordance with USDA regulations, are not now covered by the anti-discrimination laws. Those recipients of assistance from the Department could become subject to the Federal anti-discrimination laws for the first time if S. 2568 were enacted because the expanded definition of recipients appears to remove the exclusion of ultimate beneficiaries of assistance from coverage.

We are uncertain precisely which of the Department's programs would be affected by this expansion of the coverage of the anti-discrimination laws. For some programs, the effect that enactment of S. 2568 would have is clear. For example, farmers and ranchers who receive storage payments from the Agricultural Stabilization and Conservation Service under the producer storage program for wheat and feed grains or who receive disaster loans from the Farmers Home Administration are clearly recipients of Federal financial assistance but are not currently covered by the statutes because they are ultimate beneficiaries of that assistance. However, they could become subject to the anti-discrimination laws if S. 2568 where enacted. We believe the same is true of dairy farmers who are assisted by the Department's price support purchases of dairy products. We also believe that farmers who receive subsidies under the Federal corp insurance program are recipients of Federal financial assistance.

On the other hand, we think it is unclear whether handlers whose activities are regulated under a Federal marketing order are recipients of Federal financial assistance. Under the Agricultural Marketing Agreement Act of 1937, as amended, the Secretary is authorized to promulgate marketing orders containing provisions regarding price, quantity, grade, size, weight, pack of container, and transportation of milk, fruits, vegetables, and certain other commodities, which regulate the practices of handlers of these commodities. The Secretary is required to conduct a referendum of the affected producers of a commodity prior to issuance of a marketing order. When an order has been issued, its implementation is entrusted to a committee of persons appointed by the Secretary, and both the costs of the referendum and the Department's annual supervisory costs are paid from appropriated funds. We have not determined whether the payment of such expenses from Federal funds is Federal financial assistance to the handlers of a covered commodity. The Department does not currently impose any obligations on these handlers under the Federal anti-discrimination laws.

*Question 3.* Who would make the final determination whether or not individual farmers would be covered under S. 2568, if it is enacted, and would you have any input into that process?

Answer. The Secretary of Agriculture is responsible for the administration of the Department and all of its programs and activities. That responsibility includes assuring that the Department is properly carrying out its obligations under the Federal anti-discrimination laws. The General Counsel of the Department, as the Secretary's principal legal advisor, would participate in any decision by the Department and provide his legal opinion concerning the extent to which farmers would be subject to the requirements of the Federal anti-discrimination laws as they would be amended by S. 2568. Of course, it would ultimately be to the courts to resolve disputes that are likely to arise regarding the proper interpretation of imprecise statutory language.

*Question 4.* Is it conceivable that farmers and ranchers who participate in USDA programs be required to file assurances of compliance under anti-discrimination laws if the proposed legislation were enacted?

Answer. Requiring recipients of Federal financial assistance to sign assurances that they will comply with Federal anti-discrimination laws is one of the means used by Federal agencies to enforce those laws. There are others. The Department has not considered the question of which of these means would be most appropriate in the case of farmers and ranchers who would become subject to the anti-discrimination laws for the first time if S. 2568 were enacted, but certainly it is conceivable that assurances could be required.

*Question 5.* The definitions of recipient in S. 2568 are phrased in terms of State, political subdivision, public or private agency, institution, or organization, or other entity. Does this definition cover individuals? How does the bill extend the reach of current laws to individuals?

Answer. It is not altogether clear what the word "entity" means. The word "entity" as used in the definition of "recipient" contained in S. 2568 might be interpreted as covering individuals as well as corporations, partnerships, or other organizations. The bill does not contain the current exclusion, found in the Department's regulations, of ultimate beneficiaries of Federal assistance. We do believe that the term "private organization" or "entity" would cover farmers and ranchers, who, although essentially farming as individuals, have chosen to incorporate their business activities.

*Question 6.* S. 2568 defines recipient to mean various entities to which Federal financial assistance is extended "directly or indirectly or through another entity or person." Is it broader than current law, and could this language be interpreted to individual farmers who participate in USDA farm programs?

Answer. Yes, we believe S. 2568 is, in fact, broader in scope than current Federal anti-discrimination laws. Because the bill as drafted would apply to all "recipients" of Federal financial assistance and contains no exclusion for ultimate beneficiaries, we believe its language could well be interpreted to include many farmers not presently covered who participate in price support and other farm programs, and, because of the use of the term "transferee" in S. 2568, to the people with whom they do business.

*Question 7.* Is there any definition of what constitutes "Federal financial assistance"? Does this include price support loans, loan guarantees, crop insurance premium subsidies, deficiency payments, or storage payments, for example?

Answer. As provided in the Department's regulations implementing Title VI of the Civil Rights Act of 1964,

> (g) "Federal financial assistance" or "financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property or the funishing of services without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale, lease or furnishing of services to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

7 C.F.R. § 15.2(g). We believe this definition does cover such programs as price support loans, deficiency payments to farmers, federally subsidized crop insurance, and Federal research grants. However, since Title VI itself excludes from its coverage any "contract of insurance or guaranty," 42 U.S.C. 2000d-1, and since the regulations issued under Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 provide the same exclusion for any "contract of insurance or guaranty," loan guarantees are not included within the definition of Federal financial assistance. Although most of the financial assistance provided by the FmHA and the REA is in the form of direct loans which are covered under the definition of Federal financial assistance, a small portion of FmHA assistance and some REA assistance is in the form of loan guarantees which are therefore exempt from coverage.

*Question 8.* Please explain for the Committee what kind of civil rights enforcement mechanisms are used by USDA under the current laws. What effect would enactment of S. 2568 have on these enforcement mechanisms used by the Department? If the bill expands the scope of the current laws, do you have any idea how much increased costs to the Department would be involved? What about increased costs to farmers and ranchers?

Answer. A variety of compliance and enforcement mechanisms is available under current anti-discrimination laws. These include requirements of periodic assurances by recipients, compliance reviews by Department personnel, and, ultimately, termination of assistance or refusal to grant or continue assistance to programs or activities in which discrimination is found to have occurred. There is no way to predict what additional costs might be incurred by the Department to monitor and enforce Federal anti-discrimination laws if S. 2568 were enacted in its present form. Since the bill would extend coverage under those laws to all "recipients" of Federal assistance, including ultimate beneficiaries, literally millions of recipients would be added to the categories of those already covered. The Department would have to determine how best to attempt to ensure compliance by such recipients. It is fair to conclude that ensuring compliance would entail some effort and additional cost on the part of both the recipients and the Department, but the actual costs to the Department and to such recipients are impossible to predict.

*Question 9.* Is it reasonable to conclude, or conjecture, that farming operations would be subject to affirmative action or quotas if S. 2568 were enacted in its present form?

Answer. Farming operations could well be subject to Federal inquiry upon enactment of S. 2568 as to whether their activities were discriminatory in effect, even if unintended. The Federal Government would, however, be acting unconstitutionally if it were to impose on such a farming operation in such circumstances race-conscious affirmative relief designed to redress a discriminatory effect. Different treatment solely on account of sex, handicap, and age is similarly problematic.

*Question 10.* Would this bill if enacted apply to any grocery store that receives food stamps? What about banks that a farmer does business with? What about implement dealers that a farmer does business with?

Answer. I. The Department does not currently treat food stores which redeem food stamps as recipients of Federal financial assistance which are subject to the requirements of Federal anti-discrimination laws. There are no regulations or instructions that define these stores as recipients and the agreement between the Department and the stores concerning their participation in the food stamp program does not contain any reference to the requirements of the anti-discrimination laws.

This has been the practice of the Department since 1964 when the original legislation creating a food stamp program and the Civil Rights Act of 1964 were both enacted. Although a review of the Department's records has disclosed no program instruction or legal opinion confirming this position, it is clear from a review of the Department's records concerning enforcement of the Federal anti-discrimination laws and from discussions with numerous program officials that the Department does not treat food stores which redeem food stamps as recipients of Federal financial assistance for purposes of the Federal anti-discrimination laws. It is also clear that it has consistently adhered to this position over the last twenty years.

There is a reference to "small providers" in the Department's regulations concerning nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from Federal financial assistance (7. C.F.R. 15b.18(c)). That regulation has not been interpreted as referring to grocery stores, but only to the agencies and organizations that distribute food stamps to the ultimate beneficiaries.

II. It is not entirely clear whether S. 2568 would include grocery stores that accept food stamps as payment within the coverage of the anti-discrimination statutes.

On the one hand, such stores are not recipients of Federal financial assistance as it is currently defined in the Department's regulations (quoted above in the answer to Question 7).

On the other hand, it is possible such stores could be considered transferees, not of the individual, "ultimate" beneficiaries (who are not included within S. 2568's definition of "recipient") but of the organizations and agencies that operate programs that distribute food stamps and which currently are covered by the anti-discrimination statutes.

In addition, there is evidence of some congressional intent that such grocery stores should be covered by the anti-discrimination statutes. Congressman Simon states as much in response to a question by Congressman Bartlett.

> Mr. BARTLETT. * * * What effect does H.R. 5490 have on a supermarket which accepts food stamps in exchange for goods?
>
> Mr. SIMON. The food stamp example must be treated differently [from purchase made with Social Security payments]. Given the factors identified by Justice White, a supermarket which accepts food stamps is covered; that is, the market has knowledge of and control over whether it accepts food stamps. It must apply to participate in the Food Stamp Program, and it must meet certain requirements.
>
> Mr. BARTLETT. If the gentleman would yield further, would H.R. 5490 create new problems for the small neighborhood grocery store that is not so accessible to the handicapped?
>
> Mr. SIMON. In almost all cases the answer is "no". For example, if a business has less than 15 employees, the regulations governing section 504 provide an exemption from structural modifications. Moreover, these regulations include a broadly constructed concept of program accessibility which would permit home deliveries as well as other alternative means to assist shopping by a handicapped individual * * *.

130 Cong. Rec. H7038 (daily ed. June 26, 1984) (statements of Representatives Simon and Bartlett).

I should also refer you to a portion of a letter dated June 20, 1984, Secretary Block wrote to Senator Hatch concerning congressional intent, in which he stated:

> Finally, we would note that the reports of the House Education and Labor Committee and the House Judiciary Committee on this legislation, in regard to whether the Food Stamp Program would trigger coverage, state only that the respective committees "[believe] the Supreme Court adequately addressed this issue in the *Grove City College* ruling," and then quote a footnote in which the Supreme Court simply noted that receipt of food stamps by students does not trigger coverage of the colleges and universities they attend (see page 31 of the Judiciary Committee's report and pages 31-32 of the Education and Labor Committee's report on the Civil Rights Act of 1984). In so doing, we believe the committees are clearly indicating an intention to cover entities whose involvement in the Food Stamp Program is more substantive and direct.

Given the language in the above-mentioned reports that Secretary Block referred to, and Congressman Simon's comments to Congressman Bartlett, it is reasonable to conclude that this bill might well be interpreted as applying to grocery stores that accept food stamps.

In connection with the "small providers" regulation mentioned above, I should note that that regulation, if it were to apply to grocery stores as a result of enactment of S. 2568, would exempt grocery stores with fewer than fifteen employees only from making "significant architectural alterations" in their existing facilities. Grocery stores with fewer than fifteen employees would have to make other arrangements in order to comply with the law. Grocery stores with fifteen or more employees would not be exempt from making significant architectural alterations if there were no other method of complying with the law.

III. As I stated in my testimony before your committee on June 12, 1984, it is certainly possible that the banks and implement dealers with whom the farmer does business might, if S. 2568 is enacted, be covered by the anti-discrimination laws, because they could be considered "transferees" of the farmer and, therefore, recipients of Federal financial assistance.

*Question 11.* How would this bill affect the people in the tobacco industry—that is, how would it affect both the tobacco farmers and the tobacco warehousers?

Answer. Tobacco farmers are recipients of Federal financial assistance under the tobacco price support program. As ultimate beneficiaries of that assistance under current law, they are not now covered; they would become subject to the Federal anti-discrimination laws for the first time if S. 2568 were enacted.

The associations through which the farmers market their tobacco are already subject to the Federal anti-discrimination laws because they receive Federal financial assistance in connection with their participation in the administration of the tobacco price support program and they are not the ultimate beneficiaries of that assistance. Under current law, the anti-discrimination laws apply to the program or activity of an association which is receiving assistance. If S. 2568 were enacted, this coverage would be broadened to include the farmers.

[The following letter from Mr. Oliver was subsequently received by the committee:]

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U.S. Department of Agriculture,
Office of General Counsel,
*Washington, DC, June 8, 1984.*

Hon. Jesse Helms,
*Chairman, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, Washington, DC.*

Dear Mr. Chairman: On June 1, 1984, you wrote me requesting an analysis of the impact on agricultural programs of S. 2568, entitled the "Civil Rights Act of 1984." In particular, you asked whether S. 2568, if enacted, would have the effect of extending the reach of relevant Federal laws to "farmers and agribusinesses who receive Federal assistance." I believe S. 2568 might indeed extend the reach of applicable Federal laws regarding discrimination, as defined in Federal regulations and court decisions, on the ground of race, sex, handicap, and age ("civil rights laws"), to the American farmer in ways neither intended nor fully understood. The analysis below is brief because of this office's attempt to respond to your request quickly.

Under the Federal laws prohibiting discrimination on the grounds of race, age, or handicap, discrimination is currently prohibited in "any program or activity receiving Federal financial assistance." In the case of Title IX, which prohibits discrimination on the grounds of sex, discrimination is prohibited only in educational programs and activities. The Supreme Court held in *Grove City College* v. *Bell,* 104 S. Ct. 1211 (1984), that the current laws prohibit discrimination in a specific program or activity receiving Federal assistance and, when discrimination is found to have occurred, Federal funding may be terminated only with respect to the program or activity in which the discriminatory conduct was found to have occurred. S. 2568 would amend Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964 to prohibit discrimination by "recipients of federal financial assistance" rather than discrimination in "any program or activity receiving assistance," and to allow termination of any "assistance which supports" the discriminatory activity.

This Department is committed to vigorous enforcement of Federal civil rights laws. We are concerned, however, that if S. 2568 is enacted in its present form, it could so broaden the reach of the Federal laws regarding discrimination that it would make them applicable, in a manner that has never been contemplated, to individual farmers who participate in programs administered by this Department, and to recipients of Federal loans and grants.

Under the present statutory prohibitions against discrimination in "any program or activity receiving Federal financial assistance," the Department has treated the provision of agricultural price supports to producers as a program or activity. Thus, for example, cooperatives that assist the Department in the administration of the program are subject to the requirements of these civil rights laws and regulations regarding discrimination. The producers themselves, however, although arguably recipients of Federal financial assistance in the form of price supports loans, are not considered to be engaged in a program or activity receiving Federal financial assistance.

Under the proposed legislation, producers would be considered recipients of Federal financial assistance. As a result, it seems possible that price support loans could be denied them under certain circumstances. Presumably price support loans would be perceived as supporting all of the farming activities of the producer and therefore all of those activities would be subject to the requirements of the applicable laws regarding discrimination. This would add an expensive burden of enforcement to such USDA programs. The situation might be the same for producers receiving assistance in the form of premium subsidies under the Federal crop insurance programs.

I have discussed above the possible effect of S. 2568 on farm price support programs. We have not had time to analyze the bill's potential effects on other Department programs, including, for instance, (1) its effects on recipients (including individuals as well as business entities) of electric and telephone service provided by cooperatives which borrow from the Rural Electrification Administration; (2) its effects on recipients (individuals as well as business entities) of benefits from watershed and irrigation projects conducted or financed by the Soil Conservation Service; (3) additional potential effects on users (individuals as well as business entities) of National Forest lands; and (4) its potential effects on growers, handlers, packers, and others who are beneficiaries or recipients under Federal marketing order and other regulatory programs.

In nearly all of the programs administered by this Department, S. 2568 would appear to broaden substantially the applicability of the present Federal laws and regulations regarding discrimination, making them applicable to many more recipients, charging Federal agencies and recipients alike with additional and burdensome recordkeeping and compliance requirements, and extending those laws to new categories of recipients in a manner not heretofore contemplated by the Executive Branch or the Congress.

The language of S. 2568 is broad, vague, and little understood. The effects of the proposal on the American farmer and the people he does business with—on the American farming industry as a whole—can only be guessed at. Such a proposal should not be enacted without the fullest consideration. I therefore recommend that S. 2568 be thoroughly considered for its potential effects on thousands of beneficiaries of Federal assistance under programs administered by this Department—as well as by dozens of other Federal agencies.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

DANIEL OLIVER, *General Counsel.*

The CHAIRMAN. Now, we will have another distinguished farm leader, C.H. Fields, assistant director for national affairs of the American Farm Bureau Federation.

We welcome you here and thank you for coming. You may proceed, sir.

## STATEMENT OF C.H. FIELDS, ASSISTANT DIRECTOR, NATIONAL AFFAIRS DIVISION, AMERICAN FARM BUREAU FEDERATION

Mr. **Fields**. Thank you, Senator. We appreciate the opportunity to be here this morning to speak about this subject that we think is fairly serious. As you know, we represent in excess of 3 million members across the country in 48 States and Puerto Rico, in 2,762 county units of the organization.

In January the voting delegates of the member State Farm Bureaus adopted statements of policy that describe some of the basic positions of the organization:

> We believe in the representative form of government—a republic—as provided in our Constitution; in limitations on government power; in maintenance of equal opportunity; in the right of each individual to freedom of worship; in separation of church and state; and in freedom of speech, press and peaceful assembly.
>
> Property rights are among the human rights essential to the preservation of individual freedom.
>
> Congress must assume the responsibility to preserve our federal system by reversing the trend toward centralization of authority in the Executive and Judicial Branches * * * by:
>
> * * * Avoiding delegation of broad, discretionary powers to the Executive and its regulatory agencies * * *
>
> Decentralization of power and responsibility in the federal government should be encouraged. Public functions should be performed by the qualified unit of government closest to the people without coercion by administrative agencies of higher units of government.
>
> The federal government should not withhold funds or threaten reprisals in an effort to force state governments to take legislative or administrative actions not acceptable to the states.
>
> We believe in the American capitalistic, private, competitive enterprise system in which property is privately owned, privately managed and operated for profit and individual satisfaction. Any erosion of that right weakens all other rights guaranteed to individuals by the Constitution * * *.

Let me say that farmers are firm in their belief in equal rights and protection under the law, and opposed to any form of discrimination, believing as we do in the dignity and worth of the individual and equal opportunity based on individual merit.

As a general rule, the Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague, and all-encompassing language contained in S. 2568, particularly in the definition of "recipient of Federal assistance," may be an open invitation to the Federal bureaucracy and courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.

This is a serious enough threat to the integrity of State and local government, but the language in this bill may be interpreted to bring under the regulation of the civil rights statutes a large portion of all private sector activity; even individual farmers and ranchers, as has just been indicated by Mr. Oliver, who are recipients of various forms of public assistance or who receive support from Federal programs that may be affected.

We are mindful of the fact that some 700,000 farmers and ranchers are employers. Any regulation affecting employment practices could have an impact on agricultural employers with regard to sex, age, or handicap requirements. Several thousand farmers throughout the country operate roadside marketing and other direct marketing to consumers. The structures used in these operations could be subject to access requirements and handicap regulations.

The Department of Agriculture administers a number of programs involving Federal assistance and direct assistance to farmers and ranchers. The broad language in this bill certainly raises questions as to what impact antidiscrimination regulations would have on such benefits as loan guarantees, commodity loans, and price support payments.

We have not had an opportunity to make an indepth legal analysis of the various USDA programs and services that could be impacted by this legislation, and cannot be sure how far the various antidiscrimination regulations might be extended to individual farmers who benefit from Federal assistance.

We trust that this hearing will shed some light on the questions and concerns that have been raised, and hopefully the questions you will raise with Mr. Oliver will be helpful in that respect.

Further, these statutes provide for the right of private action, with legal fees awarded to the prevailing parties. Thus, farmers and ranchers may find themselves defendants in thousands of lawsuits arising from employment practices, credit, marketing, and other activities that could be considered covered by this legislation.

We have read the statements by the sponsor and several cosponsors made on the floor of the Senate on the introduction of the bill, including the assurances that it is not the intent of the sponsors to break new ground and that the bill is not intended to alter the current definition of recipient of Federal financial asssistance, nor that it is intended to alter substantive protections afforded by the laws that are to be amended.

In light of the testimony presented by Assistant Attorney General William Bradford Reynolds, the analysis of the bill prepared by the chief counsel of the Office of Management and Budget, plus a review by other legal and legislative experts, we are not satisfied with those assurances.

We are well aware of the fact that any historical study of civil rights legislation leads to the conclusion that administrators and judges who interpret the language of such statutes tend to be creative and to interpret the language as broadly as possible.

We agree with Mr. Reynolds, Mr. Horowitz, and others that the broad and ambiguous language used to define "recipient" leaves a number of unanswered questions as to how this language may affect the business community, including agricultural producers and marketers.

We are also cognizant of the more recent developments in the area of laws and regulations that seek to end discrimination on the basis of race, sex, age, or handicap, in which the effect of action or lack of action is used to determine whether discrimination has occurred, even in the absence of any intent of discrimination.

This concept is currently spreading to the idea of comparable worth, in which some would have the bureaucracy or the courts determine what a person should be paid for a given job rather than the marketplace.

The concept of numerical quotas in employment also arises from attempts to assess discrimination based on effect or utilization. The idea of quotas is inimical to anyone, including Farm Bureau members, who believe in equal treatment under the law and equal opportunity based solely on merit.

We are opposed to S. 2568 as presently written. It is clear that it goes far beyond the *Grove City College* decision of the Supreme Court. We understand that the sponsors of the bill seek to maintain the purpose and effectiveness of the present civil rights laws, and we do not disagree with that purpose.

If, in fact, the sponsors of this legislation are sincere in desiring to break no new ground, the Senate should narrow the scope of the language to achieve only what the sponsors say they seek to achieve—nothing less, nothing more.

The CHAIRMAN. Right.

Mr. FIELDS. It would be easy for the Senate to proceed with enactment of S. 2568, as introduced, particularly in an election year in which any legislation labeled as a civil rights bill is difficult to call into question. It is essential, however, that the Senate assume its responsibility to give this bill thorough study and every effort be made to rewrite the language so as to narrow the scope and to make the intent more specific.

Senator, we have already gone too far in this country in concentrating power in the central government. In an era in which the administration and the Senate is attempting to reverse that trend, along with efforts to reduce the burden of Federal regulations on the private sector, it makes no sense whatsoever to enact legislation, regardless of its label, that poses a threat of greatly increasing regulatory entanglement in the private sector and further centralizing authority in Washington.

I appreciate this opportunity.

The CHAIRMAN. We appreciate your coming. This is an excellent statement. You are certainly correct about the timidity of legislators even to question anything bearing the label of civil rights in an election year, or any other year for that matter.

If you want to catch a lot of flack, you just raise a question about this bill and you will see what you get back home. I get it—cartoons, editorials that I am messing around in areas that are no business of mine. Well, as long as I am chairman of this Agriculture Committee, the welfare of the farmer is going to be my business, and I think we ought to know and we do not know.

This piece of legislation as written, as it now stands, would be just a legislative time bomb for any Federal judge around the country to tinker with. In each one of those cases that Bill Friday and the University of North Carolina were in for 13 years—finally, we worked it out, but it cost the taxpayers of my State $100 million to try to comply with all of the do-dads that the Federal Government imposes.

Your responsibility with the Farm Bureau, at least in part, involves dealing with labor issues?

Mr. FIELDS. That is right; I am assigned mainly to labor issues.

The CHAIRMAN. And that would make you knowledgeable about lawsuits and litigation brought from time to time in such cases?

Mr. Fields. Yes. We are very aware of that because of, basically, the existence of the Legal Services Corporation and all their recipients, and because of thousands of lawsuits that are filed every year against farmers in employment as it is.

Now, if we had this whole area of regulation opened up to private action, God knows where we would go in that respect.

The Chairman. Well, I realize I am asking you to speculate, but you have got to start somewhere in analyzing a piece of legislation and its impact. Can you give me a hypothetical case of, say, an individual farmer? How much would it cost him to try to defend himself in litigation to be brought under this bill?

Mr. Fields. Senator, I am like you; I am not a lawyer. I am just, you know, one of these old farm boys from down in the country, but in some of the cases where we have been involved in other suits brought mainly by Legal Services groups, it is not unexpected that farmers end up spending, being liable or being asked to spend $100,000 when a case goes all the way to the higher Federal courts. You get into tremendous legal costs.

The Chairman. Well, maybe we ought to change the name of this piece of legislation to the lawyers' enrichment fund, or something like that.

Mr. Fields. Yes. By the way, we had a case out in the Midwest involving employment practices in agriculture where a class suit was brought and the total claims that were brought under the suit would have amounted to over $7 million.

The Chairman. Would there be an increase of such suits, do you think, if this bill were passed?

Mr. Fields. Well, the difficulty with this language is that I cannot sit here and make any absolute statement that such would happen.

The Chairman. Of course you cannot.

Mr. Fields. I think all we can do is raise the question that we do not know, and I think we deserve the right to know before, as you say, we head over another cliff.

The Chairman. That is right. Well, at a very minimum, the paperwork on the individual farmer would increase enormously, would it not?

Mr. Fields. Yes. The last time I talked to any farmers, they are not too happy with the paperwork as it is.

The Chairman. Just keeping the records, in the event a farmer has to defend himself, would increase that four- or fivefold, I am sure.

Well, I will not keep you longer, but I do appreciate your fine statement. Let us make a little deal that we will watch the progress of this bill, which I hope will be exceedingly slow.

Mr. Fields. We have requested this morning, Senator, that the full Senate Labor and Human Resources Committee hold another day or two of hearings on this bill.

The Chairman. I expect there will be some difficulty in getting it scheduled with any security on the Senate floor. This is an election year and the Senate will be in and out like a pendulum.

Thank you very much.

The next witness is Gordon S. Jones, vice president for academic and Government relations of the Heritage Foundation.

Mr. Jones, we welcome you and it is nice to see you. You may proceed.

## STATEMENT OF GORDON S. JONES, VICE PRESIDENT, ACADEMIC AND GOVERNMENT RELATIONS, THE HERITAGE FOUNDATION

Mr. JONES. Thank you, sir. Mr. Chairman, my name is Gordon Jones. I am vice president for academic and Government relations for the Heritage Foundation, a nonprofit, private, public policy research organization.

While Heritage takes no position for or against this legislation, the bill does raise certain questions which could certainly affect the conduct of farm and surplus commodity programs under the jurisdiction of this committee.

When S. 2568 was first proposed, it was advertised as a simple piece of legislation designed to reverse a single ruling of the Supreme Court. In the case in question—the *Grove City* case, decided on the 28th of February—the Court held that aid to an educational program or activity did not mean the entire institution, but only the specific program or activity receiving the assistance.

Consequently, the Court found, the remedy for discrimination in such a program or activity, normally a cutoff of Federal funds, must be limited to the specific program or activity and could not be institutionwide.

Two bills have been introduced in the Senate to correct the supposed error of the Supreme Court—S. 2568, and an earlier bill introduced by Senator Packwood, S. 2363. In my opinion, the earlier bill would indeed have reversed *Grove City,* and would have done nothing more.

The fact that that bill is apparently being rejected and that S. 2568 appears to be on its way to passage indicates that its supporters have in mind doing considerably more than simply reversing *Grove City.* It is commendable that this committee is looking into what might possibly be happening.

There are a number of potential implications of S. 2568 and its companion bill in the House, H.R. 5490. A number of these have been discussed before other committees and subcommittees of the Congress, and I will try today to limit my remarks to issues of particular interest to the members of this committee.

I hasten to say that I cannot address all the implications of the bill because I simply do not know where it stops. It is quite likely that every committee of the Senate could find that this bill has implications within its jurisdiction.

Consider, for example, the question of guaranteed loans and contracts, an issue which is of critical concern in a number of farm programs. In the original case brought by the *Department of Education* v. *Grove City College*, the Government attempted to cut off guaranteed student loans, despite the explicit exemption in section 902 of title IX for "contracts of insurance or guaranty."

The district court rejected the Government's argument, as well it might, and the Government did not press the point on appeal. I suspect, without yet having had a chance to research it, that the change in administration might have had something to do with the decision not to appeal on that question.

The point is, title IX contains a specific exemption for loan guarantees, although the *Grove City* case is evidence that even that does not stop some bureaucrats. However, none of the other three civil rights statutes which are broadened by S. 2568 contain such an exemption.

Does that mean that guaranteed crop loans can be cut off where a farmer does not employ the proper mix of men and women? I cannot say positively that it does mean that, but I see no reason why it could not be read to mean that, and I am certain that attempts will be made to read it at least that broadly.

Is it the intent of the authors of the bill that discrimination be determined in all cases by effects? At the present time, Federal requirements cover those activities of States and private entities which receive Federal money. It is there that the effects test comes into play.

This legislation would import effects tests into every area of State and private activity, even those not directly supported by Federal money. For instance, will it be possible to require that boards of directors of farmer and producers cooperatives be racially and ethnically balanced? Will it be possible to require crop set-asides to be allocated according to ethnic or racial criteria? If the authors of the bill do not wish to require proportional results, they should say so.

Who is to enforce this legislation? It seems to me that this legislation sets the scene for chaotic enforcement battles. For example, the Department of Housing and Urban Development has issued regulations based on title VI. Without knowing for sure, I imagine that the Department of Agriculture has as well.

Under this bill, HUD could enforce its regulations pertaining to architectural barriers to the handicapped against a farmer operating with Federal loans, guarantees, or protected by commodity marketing orders.

Did the authors of this bill desire this result? If not, they should specify who is responsible for enforcement.

There has been much discussion of the mom and pop grocery store, and whether under this bill the cashing of food stamps would make all stores subject to all civil laws. I have read that the authors of the bill do not intend that result, but frankly, I am not reassured. I have read that the courts have not construed the acceptance of food stamps as acceptance of Federal aid, but I have not seen actual case law on the subject. But whatever the courts have done in the past, the law is being changed here, and no amount of informal statements will balance the plain language of the statute. If the authors of this bill do not want mom and pop groceries to be covered, what is wrong with specifying that in the law itself?

What is the cost of this bill? I can not read it without thinking that it provides a vast expansion of civil rights enforcement. Such enforcement is not costless. By how much will the Department of Agriculture need to have its budget increased? It is not acceptable to state that no increase in funds will be necessary. That would make this bill an empty promise where no delivery was intended.

There is virtually no limit to the questions that occur to a careful reader of the bill and the introductory statements of its sponsors. The examples I have given here are only a very few of the possibilities.

Well, you may say, these questions are interesting, but why should we not bring to bear the full range of civil rights enforcement against institutions, public and private, that discriminate? After all, we do not want people discriminating. If we can use these mechanisms to root out discrimination, why should we not do so?

There are at least two reasons why we should not use these mechanisms. One is based on the philosophical defense of freedom, even freedom to do bad things, and the question of whether there should be a private sector, outside the reach of Government action. I will leave that question aside for the moment, although it is very interesting to me.

I want to make it clear that it is important to bring to bear serious social pressures against discrimination. But the question is, what constitutes discrimination? Is it discrimination when only 2 percent of loanable funds go to blacks? It may be, but it may not be.

Is it discrimination when only 1 percent of Federal farm assistance programs go to Hispanics? I do not know what the real numbers are. I am bringing those up simply as possibilities. I have no idea what the actual numbers are, but I am quite certain that whatever the numbers are, they do not reflect the actual proportion of various ethnic and minority groups in the population as a whole.

The question that I am alluding to is the difference between an intent to discriminate and the unintended consequence of neutral action. It is, of course, the whole question of affirmative action and quotas that you mentioned previously.

Americans have amply demonstrated their opposition to institutionalized racism and discrimination. They have just as adamantly demonstrated their opposition to artificial quotas. That opposition is consistent across racial, ethnic, and gender lines. It shows up as concrete opposition to school busing, to affirmative action admissions and hiring policies, to relaxed standards of competency, and to any of its other manifestations.

To the extent that this legislation increases the possibility for such programs of affirmative action, it will be resisted by most Americans as an unwanted and dangerous interference with private arrangements. It is not necessary for this legislation to take that step to accomplish the purposes its sponsors set forth for it.

This committee, and other committees as well, should not be dissuaded from taking a close look at this bill. You should not be intimidated by assurances that this bill is not aimed at agriculture and farm programs. It is silly to pretend that it cannot be improved.

After all, the proponents of this bill maintain that the Supreme Court misread congressional intent in title IX, and that the *Grove City* decision reflects that misreading. That being the case, it is obvious that further misreadings of congressional intent are possible, unless Congress spells out exactly what it is trying to do.

This legislation does not meet that test. It is simply not clear what is being attempted here. In choosing this language over that of H.R. 5011 or S. 2363, Congress is telling the Court that it wants to go beyond just overturning *Grove City.*

Nor does this bill only overturn *Grove City* and bring the four major civil rights statutes into harmony. That could have been done by fairly simple amendments to the Schneider or Packwood bills. This legislation goes far beyond that kind of simple action.

In short, Mr. Chairman, it is short-sighted and arrogant to refuse to consider possible amendments to this legislation. There are Senators with honest questions about the reach of this bill. There are groups who need to be reassured that this legislation will not reach them, or that it will reach them in ways that are consistent with the broad guarantees of the U.S. Constitution and the American tradition. Not to reassure these groups is to weaken the commitment to civil rights law and to risk the possible disruption of our society.

Mr. Oliver's testimony reminded me of one other possibility that is relevant to this committee, and that deals with food stamps. It seems to me that this legislation may create a right of private action of one individual against another who is a recipient of some form of Federal assistance; for instance, food stamps.

Suppose you had a situation where two families lived side by side and one happened to be of a different racial group, and one of those families, or maybe both of them, was receiving food stamp assistance, and one family cast racial aspersions at the family next door.

Would it be possible for one family to take the other one to court and get a cutoff of their Federal food stamp assistance?

It sounds like an outrageous possibility, but——

The CHAIRMAN. I am sure there is a Federal judge somewhere that will rule in that direction, yes, sir.

Mr. JONES. Well, I am sure there is. The fact is that unless some attempt is made to narrow the definition of recipient or to clarify it in some way, I am sure that that sort of thing will be tried. The possibilities for disruption and for racial disharmony are enormous.

The CHAIRMAN. Well, now, let us go back to a statement that you made about the original Packwood measure, S. 2363. Was that it?

Mr. JONES. Yes, sir.

The CHAIRMAN. You said that you believe that that would not break any new ground?

Mr. JONES. In my opinion, that bill would have done what the sponsors of this legislation say they want to do, which is to provide that in the event a college or university discriminated in any of its programs, assistance could be cut off to the entire university.

Say the chemistry department is found to be in violation of title IX in some way. Under the Supreme Court's decision in *Grove City,* the only thing the Department of Education could do is cut off funds to the chemistry department. That, it is thought by the sponsors of this legislation, is not enough of a stick; the potential cutoff needs to be broadened to include the entire university.

I think you may have a problem dealing with multicampus universities, as in New York, California, and some other States, where you have a single university with campuses in many different cities. I think that could probably be taken care of under the Packwood bill.

But in any event, what the Packwood bill did is say, that is what we meant. We do not mean the specific, narrow program or institution—not just the chemistry department, but the whole university; Duke University, or whatever.

That kind of a bill, I am convinced, would have flown through the Congress. There is really not that much opposition to it. Brad Reynolds is in favor of it, and said so as soon as the Supreme Court ruled back in February. Virtually everyone would support that kind of a bill, and there is some substantial reason to support it.

Not to support a bill of that kind leaves the situation where you have got Mr. Oliver's former department ferreting through the books of every university, trying to trace every Federal dollar. Is this dollar to the university or is it to the chemistry department or is it to that specific chemistry professor, or is it to the graduate teaching assistant that he hires?

Rather than go through that exercise, which I expect would be enormously disruptive and costly, it might well be desirable to say we should make the remedy institutionwide. And if that graduate teaching assistant is discriminating, let us give the Department of Education the opportunity to cut off aid to the entire school, to the entire campus.

But let us not do what this bill does, which is to bring in not only that university, but also its parent organizations, which may be the entire State of, say, North Carolina or California, and every one of its subdivisions—possible assignees, and so on, unto the third and fourth generation.

The bill could have been narrowly limited, and the Packwood bill was. If you wanted to broaden the Packwood bill to include these other three statutes, you have got a little bit tougher drafting problem, but I do not think it is insurmountable. That could have been done. I think it is very revealing that that was not done.

The CHAIRMAN. Thank you very much; I appreciate it.

Now, we have a distinguished professor from Notre Dame, Charles C. Rice, professor of law at Notre Dame, South Bend, accompanied by James McClellan of the Center for Judicial Studies in Washington. And they just added one, and if I foul up your name, Mr. D'Agostino—is that anywhere near correct?

Mr. D'AGOSTINO. That is correct, Senator.

The CHAIRMAN. They call me "Hellums" down in North Carolina. Robert D'Agostino is a former deputy assistant attorney general for civil rights at the Department of Justice.

We welcome all three of you gentlemen. Charlie, it is always good to see you. Charlie, suppose we take you in the order listed—Dr. Rice, Dr. McClellan, and Mr. D'Agostino, in that order.

## STATEMENT OF CHARLES C. RICE, PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME, SOUTH BEND, IN; ACCOMPANIED BY DR. JAMES McCLELLAN, CENTER FOR JUDICIAL STUDIES, WASHINGTON, DC, AND ROBERT D'AGOSTINO, FORMER DEPUTY ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE

Professor RICE. I would like to submit for the record a constitutional impact statement which I wrote on behalf of the Center for Judicial Studies on this bill.[1]

The CHAIRMAN. Very good.

Professor RICE. I concur with the analyses that have been made this morning, particularly the legal analysis by Dan Oliver. I think there are just a couple of other points to mention.

I do not think people are really aware of the scope of the definition of recipient in this bill, so that if you have aid to a highway department of a State, the result is, for example, that the State licensing board is subject to all of the applicable statutes that are covered by this bill.

If you have the grocery store that takes food stamps, it seems clear—although Senator Cranston said that that was not his intention under the bill, it seems clear that that grocery store is covered.

Underlying it all is the reality that the effects test was applied here, so that what we are talking about is not discrimination in the classic sense, but we are talking about unintentional discrimination—conduct which is interpreted by some Government official to be not reaching his desired goal in achieving whatever sociological criterion he wants to bring about.

It is true that it is, in terms of education, a back-door ERA in terms of the impact on sex discrimination in educational institutions. These are all very significant things, but with respect to the concerns of this committee, I think some of the factors have been touched on already.

I am particularly concerned about the impact of this bill on increasing litigation. It is really an attorneys' welfare bill, and it would present the prospect of increased litigation, combined with the existing interpretations where attorneys' fees are recovered and costs are recovered in these bills.

However, I would like to address one point which I think has been raised by Mr. Oliver, but bears some further emphasis, and that is that there are two holdings in the *Grove City* case. One holding is that aid to the person is aid to the institution where he ultimately spends the aid.

As Mr. Oliver very correctly pointed out, you cannot say that *Grove City* is a recipient because it takes the basic education opportunity grant from the student without saying that the seller of the fertilizer, the seller of the tractor, or the bank is a recipient when he takes the aid from the farmer. I mean, you cannot have it both ways; you cannot have it one way and not the other—you have to have it both ways, I should say.

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[1] See p. 35 for a reprint from the Constitutional Impact Statement submitted by Professor Rice.

So the implications here for those who deal with farmers are very clear if you accept the first half of *Grove City*. I think one of the unfortunate things is the haste—I think the very unseemly haste—with which this bill has been considered has obscured any reflection on that first half of the *Grove City* decision because the concentration has been on the second half, the institutionwide coverage.

I think there are grave problems with reversing that aspect of *Grove City* which we could get into, but there has been very little attention paid to the first half of *Grove City*. We have adopted the notion implicitly in this whole thing that when you give aid to an individual, that is aid to the entity where he spends that money.

Consider what that does, for example, with respect to the establishment clause cases involving religious schools; involving textbooks that are given to the students; involving the various other grants and loans to students who take that money and spend it at church-related institutions and church-related colleges.

The implications of this are very serious and I think the bill requires much more consideration than it has been given. Finally, I would suggest that it really is not possible to fix this thing up with any kind of band-aid remedy. It has been proposed in various quarters to, for example, limit the treatment of an entity as a recipient because one of its subunits receives aid.

It has been proposed to restore the program-specific termination interpretation, and it has been proposed to make it not an automatic presumption that aid to the over-arching entity is automatically aid to the subunit. Other things have been proposed, for example, to remove the treatment of transferees as recipients.

I do not think these band-aid remedies are going to do the job because what you have underlying all this is a combination of interpretations where you have institutionwide coverage on the one hand, which I think is a very problematical thing to do. I do not favor it for a number of reasons.

Second, and most important, you have that basic principle of the first holding of *Grove City*, which is that the aid to the person is aid to the ultimate entity where he spends his money. Once you accept that and put that into the works, I think we are going to find that it is a dangerous principle that is impossible to control.

These aspects are covered in the constitutional impact statement that I have prepared for the Center for Judicial Studies. I would be happy to answer any questions after Jim and Bob get through.

The CHAIRMAN. Thank you very much for your excellent statement.

Dr. McClellan.

Dr. MCCLELLAN. I am James McClellan, director of the Center for Judicial Studies. I appear here, however, in my own capacity, not as a representative of that organization. I might mention also that I am a member of the Farm Bureau and have a farm in Virginia, where we grow tobacco and berries. So I will be directly affected by this legislation, according to the excellent testimony of the general counsel from the Department of Agriculture.

I do have some material that I would like to submit for the record in addition to the constitutional impact statement for the benefit of the members of your committee. The first is an article by

M. Stanton Evans which appeared earlier this month in "Human Events," entitled "A Blueprint for Total Federal Control."

Also, we became aware of an excellent statement issued by the Labor Policy Association, located here in Washington, which deals with the impact of this legislation on private employers which I would like to submit for the record.

I have two items from the Wall Street Journal that I would also like to add—an editorial which appeared today in the Wall Street Journal, entitled "Grove City Choo Choo," and an earlier article written by Prof. Chester Finn which appeared in the Wall Street Journal on May 23.

The CHAIRMAN. Without objection, all of these articles will be included in the record.[1]

Dr. MCCLELLAN. Mr. Chairman, I want to commend you for calling this hearing because, as the earlier witnesses have indicated, the implications of this legislation are so pervasive and expansive that we really have not had an opportunity to study the full impact of this legislation on the American people.

What I would like to do is simply briefly summarize my statement and then open it up for questions. The bill basically has four purposes. The first is the obvious one, to reverse the *Grove City College* case. The three other objectives here are to amend title VI of the 1964 Civil Rights Act, to amend section 504 of the Rehabilitation Act of 1973, and to amend the Age Discrimination Act of 1975.

So this bill is not simply an education bill; it applies to the private sector and would greatly expand the reach of Federal control of private employment practices, and would clearly increase the number of Federal agencies that would have jurisdiction to bring EEO enforcement.

One of the administrative difficulties that we have encountered in looking at this legislation is it will lead to multiple agency enforcement, which means that quite a large number of Federal agencies will all be enforcing these provisions simultaneously, leading to a great deal of administrative chaos, if past experience is any guide.

As Professor Rice has indicated, the term recipient here is very ambiguous, it is broad, and we are not sure exactly what it includes. We do know that it includes any private agency, institution, organization, or other entity to which Federal financial assistance is extended either directly or through another entity or person.

Thus, when a government entity in a State receives any Federal funds, the entire State government would be covered under this legislation.

In addition to be sued by various agencies of the Federal Government, corporations and other so-called recipients would also be subject to private right of action suits which are already being permitted under title IX and section 504, 42 United States Code, section 1988 permits an award of attorney's fees to prevailing plaintiffs in suits brought under titles VI and IX.

So, as previous witnesses have indicated and you yourself have indicated, Mr. Chairman, the primary beneficiaries of this bill would be the legal profession. This really ought to be called the attorneys' relief act. As Prof. Charles Fried of the Harvard Law School observed in his testimony before the Constitution Subcommittee, it will invite a monumental increase in litigation in the Federal courts.

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[1] See pp. 43–50 for the material submitted by Dr. McClellan.

There is no question in my mind that this statute, if it were to be enacted in its present form, would cost the people of this country billions of dollars.

The potential impact of this legislation needs to be examined. As you will note when you look at the statute, it contains no statement of findings. No congressional committee in the House or the Senate has conducted hearings extensively enough so that it can include findings in the legislation.

It is my understanding that the Congressional Research Service has not even had an opportunity as of yet to analyze this legislation. Of course, the legislation does not require or call for any economic impact analysis, so Members of Congress will be voting on this legislation without any understanding as to how much it is going to really cost the American taxpayer.

That is why these hearings here and hearings I would hope in every committee of Congress would take place so that everyone would be fully aware of the economic impact alone of this legislation before it is adopted.

Needless to say, the legislation runs contrary to the whole concept of limited government in this country. We are suffering already under massive Federal regulation. This legislation promises to increase regulation with more control of private activity.

In fact, it is really totalitarian in its sweep. It is, in fact, I would say, the most radical piece of civil rights legislation that has ever been introduced in Congress. Among other things, the whole concept of federalism will practically be abandoned if this bill is to be adopted.

It subjects every activity of every State and local government to supervision by Federal agencies which disburse money of any kind or any part to any State and local entity. Of course, any State, county, city or town receiving Federal assistance anywhere in its programs would also be subject to private suits under an effects test requiring quotas and affirmative action.

So in my view, this bill clearly violates the Constitution in general, and the 10th amendment in particular. It calls for increased centralization of authority at a time when we need greater control of our affairs at the State and local level.

It is totally inconsistent with the established principle of this country that we are a pluralistic society. It eliminates all distinctions between public and private education, and would reduce private schools and State governments to agencies of the Federal Government.

Above all, it is an invitation to judicial activism because, as many previous witnesses have pointed out, the ambiguities here call for many different, conflicting interpretations. And we can be certain that Federal judges will run with this statute and create, over and above it, case law which will extend its effects even further.

In 1950, Senator Robert Taft, a distinguished member of this body, observed, "Every proposal for Federal action must be judged by its effect on the liberty of the individual, the family, the community, industry, and labor. Such liberty cannot be sacrificed to any theoretical improvement from Government control or Government spending."

Judged by this test, I would submit that this legislation violates the whole concept of American freedom. It was Senator Taft who warned against Federal aid to education many, many years ago and argued that it would prepare the way for total Federal control of education.

Massive Federal aid to public schools in this country began in 1965, less than 20 years ago, and Federal control of educational policy has been clearly a great failure. Over the last 20 years, the quality of education in this country has declined as the Federal control has increased.

It seems to me that we should be moving the Federal Government out of the area of education, out of the private sector, out of corporation policy, to allow the American people to express their own individual freedom, their own wishes, and to be left alone.

I thank you.

The CHAIRMAN. Thank you, Jim.

Mr. D'AGOSTINO. Senator, I am Robert D'Agostino.

The CHAIRMAN. You have been in civil rights enforcement.

Mr. D'AGOSTINO. Yes, I have, and I am going to address that.

The CHAIRMAN. Good.

Mr. D'AGOSTINO. I am Robert J. D'Agostino, former deputy assistant attorney general for civil rights. My responsibilities included coordination of civil rights regulations throughout the Government, with the exception of EEOC regulations.

So I am a former regulator and I am quite familiar with what goes on in the Government in drawing up regulations. Let me say one thing for the record, and that is that prior to the *Grove City* decision, the only place where there was institutional coverage was in title IX, and it was through an interpretation of program or activity.

Charles Fried addressed that in his testimony before the Subcommittee on the Constitution. So in terms of this bill not breaking new ground, that, of course, is absolutely false. It breaks tremendous new ground, and it breaks new ground in this area.

As a former regulator and someone who tried to figure out congressional intent, which was often very difficult, in this area there are four very interesting problems in this bill, and that is transferee, which is a very broad, broad word—although used in regulations here and there, it has never been given a full reach. It is not the same as a successor or an assignee; a transferee means something else.

The phrase "receives support" is not defined and, of course, the exclusion of ultimate beneficiary has tremendous consequences. After all, if Congress left out the phrase, "exclusion of the ultimate beneficiary," they must have had a purpose. Those need to be addressed.

I think Dr. McClellan said very well, where are the congressional findings?

Let me turn to the regulatory process itself and who makes the decisions. First of all, I hate to be cynical, but it seems to me that you get a bunch of people together to make regulations and the answer is people's self-interest comes to the fore.

Who benefits from regulations? The answer is simple. Who is the immediate beneficiary of regulations? The people who draw them up, who are lawyers. Regulations are a way of shifting decisionmaking from one group to another group. It is as simple as that.

Now, I am not saying that you do not need to do that at times, but that is what it is. Now, you have read Thomas Sole, Walter Williams—"State Against Blacks," et cetera, and those kinds of books. You learn that in turn-of-the-century Washington, DC, black artisans were making the same money as white artisans. It was not until the rise of unions and their support and favored position by the Government that drove skilled black craftsmen out of the construction trades.

Then you understand very well that the State has been historically the enemy of civil rights, not the friend. And insofar as these civil rights laws look to having the State color-blind, we are all for them. But now we are going to go into the private sector in a major way.

Now, we go back to the basic question, where are the congressional findings? What is discrimination? How are we going to define this?

I have heard Representative Gray very articulately on Philadelphia television answering Clarence Pendleton and talking about institutional discrimination, institutional sexism, and institutional racism.

We had better have that defined because one of the basic assumptions of the effects test is that there is institutional racism or sexism and there are institutional problems that have to be addressed. Therefore, that is why intent is irrelevant.

After all, the *Griggs* case, the *Albemarle Paper Co.* case, and title VII are generally considered the stand for the proposition that in the employment field an employer's intentions—it is good faith or bad faith—are not relevant either to the plaintiff's proof or to the defendant's defense.

Well, if we are going to extend that effects test to all sorts of private decisionmaking more than we have already, then I think the Congress needs to define exactly what discrimination is and whether or not we want to do what essentially has happened under uniform guidelines on employment—impose a quota system across the country.

We ought to know about the economic and social consequences. The country of India has imposed just such a system. Perhaps we should study the results in India of having racial, ethnic and class quota systems imposed because that is the effect.

Part of the effect comes from simply attorneys' fees. It is very coercive, having to face attorneys' fees. After all, in the uniform guidelines on employment the first thing they do is look at the statistics. What is the effect of what you are doing? Are the results equal across racial lines?

By the way, all those statistics have to be supplied by the recipients. There does not have to be any allegation of discrimination to trigger requirements under these acts. The Government takes a look at these statistics and if the statistics do not match the profile they want it to match, without any allegation of discrimination the Government can come in and it can cost a recipient quite a bit of money.

OK, so it costs Harvard a little bit of money to defend themselves, or General Motors; big deal. We are not talking about those private areas that should not be covered; we are not talking about them. We are talking about small farms, small businesses. We are talking about people who cannot afford to pay my fees, for instance.

Now that I am in private practice, most of the time I find that my fees are pretty outrageous, and most people cannot afford them. Fortunately, there are people who are willing to pay me, so I, of course, use them as clients. But if I have to bill $55 to $85 an hour, we are talking about a lot of money to defend these suits.

It is much easier to give in to the Government and just impose a quota system. It is done in the employment world all the time.

I think Congress should take a look very carefully at these kinds of problems that are going to arise if this bill is extended. It is time for us to go back to faith in the free market. It seems to me that if we follow Professor Rice's advice and say aid to an individual is not aid to an entity—if we let students, for instance, apply for government grants and loans as students, and take that money wherever they want to go, I think the free market will take care of discrimination. Schools would have to bid for students.

Why should not the individual consumer have the choice? Why should the policy choices be imposed by a bureaucracy? Let me give you two examples, one in the agricultural area. When I was at Justice there was an audit, I think, done by the Department of Agriculture on the agricultural extension program.

They looked into the homemakers program, and the regulators decided that the homemakers program was discriminatory because the blacks were under-represented at meetings in private homes.

Well, if blacks were under-represented, then the answer is somebody had to be over-represented. I mean, the other side of being under-represented is over-represented. After all, various groups and classes are under-represented in lots of areas; hence, someone else must be over-represented.

So if we are going to start correcting under-representation as under-representation, then perhaps we have to limit over-representation. In the homemaker program the Federal Government was now questioning who was going into private homes for meetings. This is what the Federal Government was interested in.

The second thing which arose which did not arise from the Federal Government directly was the American Bar Association's initial refusal to accredit Oral Roberts Law School. Why? Because Oral Roberts Law School discriminated against atheists and Jews and other non-Christians.

Well, the whole mission of the law school was a Christian mission. The court, of course, summarily rejected that, thank goodness. But I think that we cannot be very sanguine about courts or regulators using restraint.

Two other short examples and then I will end. When I was at Justice, one of the staffers who was involved in the regulation area suggested that he had just completed a study of a town; I believe it was in Maryland. His study showed that houses owned by whites, on the average, had more yard space than houses owned by blacks. That, to him, was absolute evidence of discrimination and he suggested that we bring a suit against the zoning commission, the city, the builders. I suggested to him that maybe we should add the owners of the houses, too.

But this is not regulatory restraint. That never got off the ground, but after all banning of father-son dinners did get off the ground. So we may scoff at this, but it seems to me Congress owes it to the country to tell what they want done and why they want it done before they send this to the regulators.

One of the last things I was involved in was a court decision saying that 90 Federal agencies must promulgate regulations in the handicapped area, despite the fact that most of these agencies did not dispense Federal funds that had any impact in that area.

They tried to explain this to the court, and then they tried to explain to the court that insofar as section 504 was relevant, they would just hook onto the Justice Department coordination regulations. This was not satisfactory to the court.

How many more suits are we going to have for agencies to promulgate regulations and enforcement mechanisms? How much more money are we going to spend on this? I will just leave you with that.

Thank you.

The CHAIRMAN. Thank you very much.

Dr. Rice, let me ask you a question. Is there a body of judicial interpretation of the terms and concepts of "recipient?"

Professor RICE. Not really. It is a new word in this context. The word is specifically designed to alter the previous language, which in all four statutes was "program or activity." So we have to look to the language of the provision, which has been read into the record, and we have to, in the case of ambiguity, look to the legislative intent.

The problem is that the language is so open-ended that it is an invitation to the judiciary, which is unfortunately very activist in many respects, to make of it what they will.

The CHAIRMAN. Is the same true of the term "Federal financial assistance?"

Professor RICE. Yes, and there are other problems in the bill. The provision in the coverage terminology which says an entity which receives support from Federal aid to its subunit, or the termination provision which says you can terminate "assistance which supports"—we do not know what these mean.

I think it gets back to the ambiguity problem which is inherent in this area because of the adoption of far-reaching principles that have not been marked out as to their limits. For example, this problem that I mentioned before of treating the aid to the individual as aid to the institution—we just do not know where that is going to end.

One thing we do know about it is that if that farmer takes that loan and spends it with the tractor company or the fertilizer company, the fertilizer company becoming a recipient is going to pass the cost of complying with these statutes on to the farmer. So you know it is going to result in higher costs.

If we are talking about the student, he takes his basic education opportunity grant and he looks around and he wants a school like Grove City, which discriminated—the Government conceded that it discriminated against nobody. All they wanted was to be left alone.

If the student wants that kind of school where, because Grove City was independent, their total cost for tuition, room and board was under $5,000—as Dr. Hafen testified, the average cost of colleges and universities complying with federally mandated regulations is between 5 and 18 percent of the total tuition package. I mean, you are talking about tremendous sums of money.

Now, here is this student who has his basic grant; he is entitled to it, and now he is foreclosed from going to that kind of college because, as Dr. Hafen pointed out in his testimony before the other committee, the colleges have really only two options.

One is to refuse to take any student with any Federal aid, which is what Grove City has done, or to submit to the entire regulation process, in which case they are no longer independent. So what happens to that student who wants nothing except to go to a truly independent college? The answer is he cannot, unless he is going to forego his right as a citizen to participate in a Federal program.

The CHAIRMAN. Yes.

Mr. D'AGOSTINO. Let me just add one little brief thing, and that is that kicking around the regulations is the concept that if an entity or a person benefits from some Federal aid somewhere else, he is a recipient of that Federal aid. This, I think, is quite open-ended and is already in some regulations.

The CHAIRMAN. Well, that hypothetical student you are talking about—his civil rights are being violated, are they not?

Professor Rice. Sure, and we are not talking about somebody who is discriminating in the commonsense meaning of the term.

The CHAIRMAN. Right.

Professor RICE. We are talking about a situation where the discrimination is defined as unintentionally, innocently failing to comply with the quotas or other guidelines established by some public official, which is appropriately offered in 1984, because that is what we are talking about.

The CHAIRMAN. I came up here in 1951 to work for a Senator who had been president of the American Bar Association, and I had a little higher regard for the ABA in those days. He was always talking about case law and the impact of legislative proposals back then.

Now, I am not a lawyer, but is it my perception that this legislation may just upset the apple cart all up and down the line in terms of case law?

Professor RICE. I think it is entirely likely because you are introducing new concepts.

The CHAIRMAN. Yes.

Professor RICE. When you combine this case with the *Regan* v. *Taxpayer*[illegible] which was a compensation case, and the *Bob Jones* case, where the Supreme Court has held that tax exemptions are subsidies, and you combine this case with the first half of the *Grove City* case where grants and loans to individuals are now Federal aid, you have a situation which is very indeterminant right now. We do not know what it means and it is very much open-ended.

The CHAIRMAN. Well, I do not want to keep you all today, but I do want to get myself oriented properly. I say again I am not a lawyer and I need your help, but what are the constitutional implications of a piece of legislation like this?

Are there no limits upon the ability of the Federal Government to impose conditions?

Professor RICE. If I may just say briefly, there is a basic principle of constitutional law as well as natural law that there is no such thing as a free lunch. And if you take Government aid, properly speaking you can be required to comply with the conditions on that aid.

The Supreme Court in various cases has enunciated this very recently. In a New Jersey case, *New Jersey* v. *Bell,* they said that the State can be required to comply with Department of Education regulations because they voluntarily took the aid.

So you have that concept, and it is very difficult to foresee, in my opinion, the courts declaring this legislation unconstitutional on that ground. There is also a 10th amendment problem. I think it is wholly contrary to the spirit of the 10th amendment.

Whether the Federal courts would declare it invalid is another question, because I do not think we can rely too much on the Federal courts these days in some of these areas.

The CHAIRMAN. It has been suggested that I ask you, Dr. McClellan, as former chief counsel of the Subcommittee on the Separation of Powers, what is your personal assessment of this bill under a purely legislative analysis; that is, is this legislation clear or does it contain some ambiguities or unanswered questions?

Do you just want to chuckle and pass that one?

Dr. MCCLELLAN. Yes.

The CHAIRMAN. The staff does a great job anticipating questions, but most of the time we end up already having covered them three times.

Does this bill mean we will need fewer or more—this is editorializing—Federal bureaucrats? Of course, we have talked about that. I think there will be an enormous increase in personnel in trying to enforce this. It is so obvious.

Dr. MCCLELLAN. In many, many agencies.

The CHAIRMAN. Yes, across the board almost.

Do you agree?

Mr. D'AGOSTINO. Well, yes. I think that part of it is good intentions. You are hired to do a job. You are hired to do something and you do not want to sit around all day doing nothing, so you write regulations. I have seen it all over the Government; you just keep writing regulations.

The CHAIRMAN. Well, I appreciate the testimony of all of the witnesses this morning. I am advised that other organizations expressed an interest in testifying, but could not be here today. The record will be kept open for 2 weeks for accepting statements for the record.

Gentlemen—you three and the others who came this morning—I believe you will find that you have been most helpful because we will print your testimony and make it available to the Senate.

I find so often that Senators come in and when the rollcall begins there is a yellow pad that has a three-line description of a bill, and that may happen on this one and they may vote on the title of civil rights legislation, as one of the earlier witnesses commented.

But I think we need to know where we are going, to those of you and the ones who preceded you who have a respect for the Constitution and for the rights of the people. You know, this business of civil rights cuts both ways, and I think that is a point that has been made.

In any case, the bottom line is that we need to know precisely what we are doing and you have contributed to that, and for that I am grateful.

There being no further business to come before the committee, we stand adjourned.

[Whereupon, at 11:35 a.m., the committee adjourned, subject to the call of the Chair.]

# APPENDIX

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## STATEMENT OF HON. ROGER W. JEPSEN, A U.S. SENATOR FROM IOWA

Mr. Chairman, I would like to commend you for holding this oversight hearing today to evaluate the impact that S. 2568, the Civil Rights Act of 1984, will have on farmers and the agricultural community.

It has come to my attention that this legislation, currently being considered in the Labor and Human Resources Committee, may have adverse effects on farmers and the agricultural community.

Although S. 2568, the Civil Rights Act of 1984, is merely supposed to reverse the effects of the recent *Grove City* v. *Bell* Supreme Court decision, questions have been raised as to whether or not it goes beyond that stated purpose and could cause a significant increase in Federal involvement in predominantly private institutions.

While proponents claim the bill is intended only to overturn the Supreme Court's decision, many believe that the bill will break new ground and significantly expand current laws which address Federal civil rights enforcement. The Justice Department has said that the bill goes further than the intent of its cosponsors. Assistant Attorney General William Bradford Reynolds believes that the definition of the term "recipient" is far more sweeping than any current understanding.

I am concerned that the broad, vague, and all-encompassing language contained in S. 2568, particularly in the definition of "recipient" of Federal assistance, may be an open invitation to the Federal bureaucracy and the Courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.

The language in this bill may be interpreted to bring under the regulation of the civil rights statutes a large portion of all private sector activity. Individual farmers and ranchers who are recipients of various forms of Federal aid or who "receive support" from Government programs may be affected.

My chief concern about the legislation as it is currently written is that the definition of "recipient" is so broad that it could be construed to include such private citizens and institutions as farmers and agribusiness. For example, participation in Federal farm programs such as Federal price supports, Federal agricultural credit, or other programs may be considered financial assistance under the definition, thus bringing these private citizens and organizations under title IX of the 1972 Education Amendments, title VI of the Civil Rights Act of 1964, section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975.

It is also my understanding that these statutes provide for the right of private action, with legal fees awarded to the prevailing party. Thus, farmers and ranchers may find themselves defendants in lawsuits arising from employment practices, credit, marketing and other activities that could be construed as covered by this legislation.

I have some real concerns about the enactment of S. 2568 as it is now written. It is critical to my State of Iowa that the possible agricultural ramifications of this legislation be examined thoroughly.

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[The following material was furnished by Charles C. Rice, professor of law, Notre Dame, South Bend, IN, and is reprinted from the Constitutional Impact Statement of the Center for Judicial Studies.*]

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*Note.—Constitutional Impact Statements released by the Center for Judicial Studies are limited to the constitutional aspects of legislation before Congress, take no position on the public

Continued

## THE CIVIL RIGHTS ACT OF 1984—S. 2568/H.R. 5490

The Civil Rights Act of 1984, aptly described by Senator Robert Packwood (R.-Ore.) as "a simple bill with global ramifications," [1] has been proposed as a corrective for one aspect of the Supreme Court decision in *Grove City College* v. *Bell.*[2] This statement will analyze briefly some implications of the proposed act with respect to federalism and other aspects of the constitutional system.

### THE GROVE CITY DECISION

Title IX of the Education Amendments of 1972 [3] bars sex discrimination in "any education program or activity receiving Federal financial assistance." Grove City College, a private institution, has always refused federal and state financial assistance. Its students receive federal Basic Educational Opportunity Grants (BEOGs), which go directly to the students to pay tuition and other educational expenses. The Department of Education ruled that Grove City College itself was a "recipient" of "Federal financial assistance" and demanded that the College execute an Assurance of Compliance with Title IX's nondiscrimination provisions. The College denied that it was made a "recipient" by the fact that some of its students received BEOGs, and refused to sign the Assurance of Compliance.

The Supreme Court ruled, first, that the College was a "recipient" of "Federal financial assistance," despite the fact that "federal funds are granted to Grove City's students rather than directly to one of the College's educational programs." [4] The Court went on to decide, however, that the "education program or activity" of the College that was "receiving" federal assistance and that therefore was subject to Title IX, was not the College as a whole but only its financial-aid program.[5]

In holding that Title IX has only program-specific application, the Supreme Court rejected the contention that receipt of federal aid by any component of the college would bind every aspect of the college's activity by the Title IX prohibitions against sex discrimination. Instead, the receipt of BEOGs by its students requires the college to comply with Title IX only in the operation of its financial aid office; the rest of the college's activities are not bound by Title IX. The correctness of this interpretation is a matter of dispute.[6]

### IMPACT OF GROVE CITY ON AGE, HANDICAP AND RACE DISCRIMINATION

The key phrase, "program or activity," used in Title IX, is used also in the three main statutes banning discrimination on account of age, handicap, or race in federally aided programs.[7] Title IX, Section 504 and the Age Discrimination Act were all modeled in this respect on Title VI of the Civil Rights Act of 1964. The *Grove City* decision therefore raises the likelihood that the same kind of "program-specific" interpretation will be given to those other statutes as well as to Title IX. The judicial precedents appear to confirm this prospect.[8] It is important to remember, moreover, "that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs." [9] A program-specific interpretation of those statutes, therefore, would have an impact far beyond the area of education. Senator Kennedy expressed his concern that, after the *Grove City* decision, "the protection from discrimination provided by the government to the elderly, minorities and the

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policy objectives contained therein, and should not be construed as an attempt to assist or obstruct the enactment of any bill or resolution before Congress. The views expressed by the Visiting Scholars do not necessarily represent those of the staff or Advisory Board of the Center for Judicial Studies.

[1] Cong. Rec., April 12, 1984, S4589.

[2] 104 S. Ct. 1211 (1984).

[3] 20 U.S.C. Sec. 1681(a).

[4] 104 S. Ct. at 1220.

[5] 104 S. Ct. at 1222.

[6] Compare the testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, before the House Committee on Edcuation and Labor, May 22, 1984, with the Statement of Senator Edward M. Kennedy (D.-Mass.), Cong. Rec. April 12, 1984, S4585.

[7] Those statutes are the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101, et. seq.); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C., Sec. 794 et seq.); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000 d et seq.).

[8] See, for example, *Board of Instruction of Taylor County* v. *Finch,* 414 F.2d 1068 (5th Cir. 1969); *Simpson* v. *Reynolds Metals Co.,* 629 F.2d 1226 (7th Cir. 1980); *Brown* v. *Sibley,* 650 F.2d 760 (5th Cir. 1980); see also *Consolidated Rail Corp.* v. *Darrone,* 104 S. Ct. 1248 (1984).

[9] Testimony of Clarence M. Pendleton, Jr., Chairman of U.S. Commission on Civil Rights before House Committees on Judiciary and Education and Labor, May 16, 1984, p. 4.

disabled in all kinds of federally assisted activities is likely to be as spotty and inadequate as that offered to women and girls in education."[10]

### THE INTENT OF THE SPONSORS OF THE CIVIL RIGHTS ACT OF 1984

S. 2568 and its companion, H.R. 5490, were introduced, in Senator Kennedy's words, "to restore Title IX, Title VI, Section 504, and the ADA to their intended force and coverage." [11] "What difference does it make to a disabled student," asked Senator Robert Dole (R.-Kans.) in co-sponsoring S. 2685, "if the student financial aid office is in compliance with Section 504, if none of the school's academic programs are accessible?" [12] The bill makes three changes in all four laws:

1. The "general prohibition language in each statute is modified to delete 'program or activity' and generally to substitute the term 'recipient.' Thus, each of the four laws would prohibit discrimination 'by a recipient of' — rather than 'under a program or activity receiving' — 'Federal financial assistance.' In Title IX, the limitation to education is retained; that is, the prohibition would run against an 'education recipient' in place of an 'education program or activity.' "[13]
2. A definition of the term "recipient" is added to each of the four statutes, as will be discussed below.
3. The enforcement section of each of the laws is modified so as to enlarge the power of the agencies to terminate funding, as will be discussed below.

Senator Packwood summarized the changes as follows: "That any receipt of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that only the particular assistance supporting noncompliance will be subject to termination." [14] Senator Robert Dole (R.-Kans.), in co-sponsoring S. 2568, stressed that the bill was intended as a limited remedial measure: "I believe it should be emphasized that the sole purpose of this legislation is to restore Title IX to the broad coverage which marked its enforcement prior to Grove City, and to keep the other three civil rights laws intact. It is not the intent of the sponsors to break new ground." [15]

There is reason to believe, however, that the limited expectations of the sponsors of S. 2568 are unrealistic. This analysis will examine the likely effects of the bill in two general respects: its use of the expansive term "recipient" and its increase of the enforcement power of the agencies.

### THE MEANING AND EFFECT OF "RECIPIENT"

The four statutes amended by S. 2568 now cover "any program or activity receiving federal financial assistance." [References herein will be to S. 2568 rather than to its companion, H.R. 5490] S. 2568 would amend those statutes to cover any "recipient" ("education recipient" in Title IX) of such assistance. In all four statutes, incidentally, "tax exemptions and deductions would continue to be excluded from the definition of Federal financial assistance." [16] The term "recipient" is defined in S. 2568 as follows:

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits." [17]

Assistant Attorney General Reynolds maintains, contrary to the claim of the sponsors of S. 2568, that the definition of "recipient" in S. 2568 exceeds the definition of that term in the existing regulations under Title VI, Title IX and Section 504, in that "a recipient, as used in the existing regulatory scheme, is subject to coverage only as to its funded programs or activities; by contrast, under [S. 2568], a recipient is to be covered in its entirety."[18] In any event, it is clear that, under S. 2568, "when an entity receives federal aid for one of its parts or subdivisions, the entity—and not the specific subunit of the entity—is the recipient."[19] Senator Cranston made this plain in his explanation of S. 2568:

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[10] Cong. Rec., April 12, 1984, S4586.
[11] Cong. Rec. April 12, 1984, S4586.
[12] Cong. Rec. April 12, 1984, S4590.
[13] Statement by Senator Alan Cranston, Cong. Rec., April 12, 1984, S4594.
[14] Cong. Rec., April 12, 1984, S4589.
[15] Cong. Rec., April 12, 1984, S4590.
[16] Statement of Senator Robert Dole (R.-Kans.), Cong. Rec., April 12, 1984, S4590.
[17] Sec. 2(b)(2).

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[20]

If federal aid is extended, not to the entity as a whole but directly to one of its subunits, the entity as a whole (and consequently all other subunits) will be covered if the entity itself "receives support" from the aided subunit. As Senator Cranston explained, "Where Federal financial assistance is extended to a subunit of an entity, the question whether the entity itself and all of the other subunits of the entity would be covered would turn on the question of whether the entity "receives support" from the provision of the assistance to the subunit—for example, by receiving a portion of the assistance to help defray overhead costs. If the entity receives such support, it and all of its subunits are subject to the anti-discrimination ban, just as they would be if the entity itself received assistance directly from a Federal agency or through a third party."[21]

S. 2568 contains no definition of the terms, "receives support," "entity" and "subunit," among other undefined terms. As Senator Alan Cranston (D.-Cal.) explained, "the concept of 'support' is intended to refer to a not immaterial support having monetary value which could include, for example, services."[22]

On the one hand, aid to a State government would bring all the counties, cities, villages, school districts, etc., in that state automatically within the coverage of the age, sex, handicap and race discrimination statutes and regulations. For example, if the state receives a categorical grant for its highway department, then, if the state itself is the "recipient," all activities of the state government, including the prison system and state professional licensing boards, would become subject to the civil rights laws, which incidentally, are administered under regulations using an "effects" test, as will be discussed below. The same conclusion would follow under block grants as well. These results are automatic. On the other hand, if federal aid is given to one of the "subunits" of the State, e.g., a water district or school district, then the State as a whole is covered in all its activities and subdivisions so long as it "receives support from the extension of Federal financial assistance" to that subunit. Similarly, federal aid given to one department or campus of a university could subject every activity of the university to federal regulations regarding age, handicap, sex and race discrimination. If a university engages in non-educational, commercial activities, those activities could be covered by all four acts if aid were given to any part of the university.

As a practical matter, all states already receive federal aid given directly to themselves or through their subdivisions. The likely result of the enactment of S. 2568 therefore would seem to be an immediate extension of federal regulatory power with regard to age, sex, handicap and race discrimination, to virtually all the activities of every state and political subdivision in the land. Similar conclusions would follow in the private sector with respect to aid extended to subsidiaries and affiliates of corporations as well as to the corporations themselves.

Title IX now applies to "any education program or activity receiving Federal assistance." Under S. 2568, Title IX and the regulations adopted to enforce it would apply to any educational program incidentally conducted by a noneducational institution if that noneducational institution if that noneducational institution received federal assistance for any purpose even if it received no assistance directed toward its educational program. Senator Kennedy illustrated this by the following example: "A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison—including its educational programs—would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and these statutes are not limited to education." [23]

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[18] Reynolds testimony, supra.

[19] Statement of Senator Edward M. Kennedy, Cong. Rec., April 12, 1984, S4586.

[20] Cong. Rec., April 12, 1984, S4594.

[21] Cong. Rec., April 12, 1984, S4595.

[22] Cong. Rec., April 12, 1984, S4595.

This result would apply as well to training and other educational programs conducted by a corporation which receives any federal assistance, including, perhaps, as will be discussed below, its receipt of food stamps from "a person." Furthermore, since S. 2568 defines a "recipient" as a "transferee of any . . . entity . . . to which Federal financial assistance is extended (directly or through another entity or a person)," and since "transferee" is nowhere defined in the bill, one can only speculate as to the ultimate potential reach of S. 2568 coverage.

These conclusions become even more striking in light of the Grove City definition of aid to the person as aid to the institution. If one student at a single campus of a state university system used a BEOG, the entire university could be covered by all four acts. The apartment building owned elsewhere by that university and rented to the general public could be required to install ramps for the handicapped, etc. The Grove City decision attempted to forestall the further extension of this principle by stating, "Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX . . ." [24] But S. 2568, if enacted, would manifest precisely that intent. A "recipient" includes any of the listed types of entities "to which Federal financial assistance is extended (directly or through another entity or person)." Although S. 2568 does not inlcude a "person" as a "recipient," an entity from among the listed types would become a "recipient" if it received federal assistance "through . . . a person." So why would S. 2568 not apply all four acts to the grocer who took food stamps?

Senator Cranston did emphasize that nothing in S. 2568 is intended "to change the consistent interpretation" of the four statutes "excluding from coverage as 'recipients' individuals and businesses which may ultimately receive federally provided dollars—such as a clothing store from whom a retiree purchases a suit with a social security check or a landlord whose tenant pays the rent with funds from supplemental security income payments, and others similarly situated—as well as the individual beneficiaries—the social security and SSI recipients themselves—of such programs." [25] While it is true that the individual retiree is not a "recipient" under S. 2568, the plain language of the bill includes the grocery or clothing store to which he negotiates his Social Security check. "Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate." [26]

S. 2568 is given a further reach by the Supreme Court's 1983 interpretation of Title VI in *Guardians Assn.* v. *Civil Service Commission of the City of New York.* [27] The Court held that although discriminatory intent is necessary to show a violation of Title VI itself, nevertheless, proof of "discriminatory effect" will suffice to create liability for a violation of the regulations issued under Title VI rather than of Title VI itself. [28] Under Grove City, regulations outlawing conduct which has an unintended racially discriminatory effect are limited in their impact to the programs or activities that receive federal assistance. Under S. 2568, however, a requirement of affirmative action on racial discrimination could apply to all recipients as expansively defined in that bill.

### THE EXPANDED AGENCY ENFORCEMENT POWER UNDER S. 2568

Serious implications are raised by S. 2568's expansion of the enforcement power of administrative agencies. Under S. 2568, in the words of Senator Cranston, "all of the existing procedural safeguards that the four laws provide for before Federal funds may be terminated are retained without change—the government's initial duty to attempt resolution of the violation through conciliation, notice to the recipient of any adverse finding, opportunity for hearing, 30 days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and the right to judicial review of any decision to terminate funding."[29]

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[23] Cong. Rec., April 12, 1984, S4586.

[24] 104 S. Ct. at 1217-18, n. 13.

[25] Cong. Rec., April 12, 1984, S4595.

[26] Testimony of William Bradford Reynolds, *supra;* see also Prof. Chester E. Finn, Jr., Civil Rights in Newspeak, Wall St. Journal, May 23, 1984.

[27] 103 S. Ct. 3221 (1983).

[28] See 103 S. Ct. at 3235, n. 1 (separate opinion of Powell, J., Burger, C. J. and Rehnquist, J.).

According to the existing law, however, the power of the agencies to terminate funding is program-specific, i.e., the termination is limited to funding for the particular program or activity which is found to be in noncompliance.[30] S. 2568, by contrast, would permit the enforcing agency to terminate any "assistance which supports"[31] the noncompliance. In this respect, S. 2568 would open the door to termination of funding to an innocent program if that program "supports" another program that is in noncompliance. And it would seem clear that if a program is in noncompliance, assistance to the parent entity may be cut off on the theory that assistance to the whole provides support to the discrimination by the part.

At this point it will be useful to compare the parameters of S. 2568 with respect to basic coverage, on the one hand, and fund termination on the other. Senator Cranston explained his view of this as follows:

> Thus, in place of the "program-specific" coverage improperly imposed by the Supreme Court, coverage of all components of the recipient would be restored.
>
> "This broad construction of the entity covered by the nondiscrimination laws would apply to such areas as executing assurances of compliance, investigation of charges, and private rights of action and judicial actions by the United States to obtain injunctive or declaratory relief to bring about compliance.
>
> "With respect to the power to terminate funds or refuse to grant funds, the statutory scheme would be different. It would retain the basic concept of "pinpointing"; that is, limiting the termination of funds to those funds which have a specific nexus to the discrimination that is found."[32]

Senator Cranston's distinction is precarious, however, in light of the language of S. 2568 which would appear to make the power of fund termination practically as broad as the extremely broad definition of "recipient." As Senator Cranston himself stated:

> I would note that in our proposal, both the definition of recipient and the pinpointing provision use similar terms with respect to receiving "support" and assistance which "supports". In the former case, an entire organization, institution, or other entity meets the definition of "recipient" if Federal assistance directly to a subunit results in the parent entity also receiving some appreciable "support." In the case of pinpointing, only assistance that "supports" noncompliance may be cutoff. In both situations, the concept of "support" is intended to refer to a not immaterial support having monetary value which could include, for example, services.[33]

In light of the indefiniteness of "supports," which is not defined in S. 2568, it would seem clear that the "specific nexus to the discrimination" which Senator Cranston says is required for termination of funding, is a less than exacting restraint on the discretion of the agencies with respect to fund termination. This expanded potential for termination of funding is significant despite the fact that termination "has been actually used in only a handful of cases through the history of these laws."[34] The mere prospect of termination is a powerful inducement to compliance with federal agency directives. That inducement will be significantly increased by the grant of authority to the agency to cut off not only the funds of the program or activity that actually discriminates but also the funds of any entity or part thereof that directly or indirectly "supports" the discrimination.

Other aspects of S. 2568 would merit discussion here were it not for the limitations of space. For example, it is not at all unrealistic to describe S. 2568 as a "back door Equal Rights Amendment," in that the virtually universal character of various types of federal aid to education, combined with the "effects" test which could outlaw even unintentional discrimination, could endow federal agencies with the power to impose upon education recipients, by administrative action, many, if not most, of the requirements that would have been imposed upon them by the Equal Rights Amendment itself.

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[29] Cong. Rec., April 12, 1984, S4595.

[30] See *North Haven Board of Education* v. *Bell,* 456 U.S. 512 (1982); *Board of Instruction of Taylor County* v. *Finch,* 414 F.2d 1068 (5th Cir., 1969); *Consolidated Rail Corp.* v. *Darrone,* 104 S. Ct. 1248 (1984); see also testimony of Clarence M. Pendleton, Jr. Chairman, U.S. Commission on Civil Rights, before House Committees on Judiciary and Education and Labor, May 16, 1984.

[31] See Sec. 2(c)(2)(C).

[32] Cong. Rec., April 12, 1984, S4595.

[33] Cong. Rec., April 12, 1984, S4595.

[34] Statement of Senator Robert Dole (R.-Kans.), Cong. Rec. April 12, 1984, S4590.

Another issue is presented by the fact that S. 2568 retains the private right of action which exists under the four statutes and it continues the provision for attorneys' fees in such actions.[35] In view of the expansion of coverage under S. 2568 and the "effects" test which can forbid even unintentional discrimination, the inducement to litigiousness here is apparent. A further problem with S. 2568 arises from the fact that each agency administering the four statutes would have the responsibility to regulate all the activities of entities receiving federal assistance. This raises the prospect of added paper work, interagency conflicts, multiplicity of complaints, duplication of effort and involvement by agencies in areas in which they have neither expertise nor experience. Nor does S. 2568 provide for interagency referrals to alleviate this problem. Another potential problem is created by the exposure of federal administrators to an increased risk of personal liability through their failure to enforce the four statutes affected by S. 2568, especially in light of the expanded definition of recipients and the employment of the "effects" test for discrimination at least in the race area.[36]

The overall effect of S. 2568 on the present enforcement mechanism under the four statutes was generally summarized by Dr. Michael Horowitz, General Counsel of the Office of Management and Budget:

> Currently, limitation of coverage to programs and activities receiving Federal assistance serves as a "regulatory breakpoint", restricting burdens and liability to those programs and activities in which the Federal government has some financial interest; and by limiting review and investigatory authority over Federally assisted programs and activities to agencies with expertise in them. And the current "pin-point provision", by providing definite limits to the scope of any penalties which agencies might impose, has had a similar moderating effect. S. 2568 would remove these "breakpoints", while at the same time retaining all current judicial interpretations and agency practices under the referenced acts. As a result, standards such as the "effects test" would become applicable to all of the recipient's programs and activities, not just those receiving Federal funds.[37]

## SOME CONSTITUTIONAL IMPLICATIONS OF S. 2568

The foregoing analysis should make it apparent that S. 2568 may be criticized as vague and uncertain, for example, in its failure to define important terms such as "receives support," "entity," "submit," "assistance which supports" and others. While it is important that Congress avoid what the Supreme Court has called "the shoals of unconstitutional vagueness," [38] and while "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds," [39] it is likely that the lack of precision in S. 2568 could be remedied by the regulations issued to enforce it, which regulations can impose obligations beyond those specifically imposed by the statute itself.[40] The imprecision of S. 2568, therefore, would argue strongly in favor of clarifying amendments before its enactment but it would not justify a prediction that, without such amendments, S. 2568 as implemented would be held unconstitutional for vagueness.

Another constitutional question is raised by the expansion of federal regulatory power that would be effected by S. 2568. Private entities as well as state and local governments would be subject to pervasive regulation with respect to age, handicap, race and sex discrimination, on account of the expansive definition of "recipient" in S. 2568, its expansion of agency enforcement power and the virtual universality of federal aid. These regulatory exposures could be burdensome. However, "Congress may fix the terms on which it shall disburse federal money to the States" [41] and, with respect to private recipients, "[i]t is hardly lack of due process for the Government to regulate that which is subsidizes."[42] While the regulations sanctioned by S. 2568 would be more extensive and more intrusive than those already in place, they would appear to differ more in degree than in kind for those heretofore approved by the courts.[43]

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[35] See *Consolidated Rail Corporation* v. *Darrone*, 104 S. Ct. 1248 (1984).

[36] See *National Black Police Assn.* v. *Velde*, 712 F.2d 569 (D.C. Cir., 1983), *cert. den.*, 52 U.S.L.W. 3791 (April 16, 1984).

[37] Michael Horowitz, Memorandum, Analysis of S. 2568: The Civil Rights Act of 1984.

[38] *Buckley* v. *Valeo*, 424 U.S. 1, 78 (1976).

[39] *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 24 (1981).

[40] See *Guardians Assn.* v. *Civil Service Commission of the City of New York*, 103 S. Ct. 3221 (1983).

[41] *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981).

The point of these observations is not to endorse the increase that S. 2568 would effect in federal regulation of the private lives of Americans, but to suggest merely that it is unlikely that the Supreme Court will find S. 2568 unconstitutional on that account. The decision would seem to be for the Congress rather than for the courts.

A more difficult question is posed by the impact of S. 2568 on state governments themselves. If S. 2568 were enacted in its present form, it would instantly subject virtually every operation of every state and local government in the land to the potential supervision of federal agencies with respect to age, handicap, race and sex discrimination, including unintentionally discriminatory conduct that has discriminatory effects, with the attendant potential for affirmative action requirements. Such a massive preemption of state authority would seem to be contrary to the spirit, if not the letter, of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment was long regarded as a mere "truism," reciting the obvious fact that all powers not delegated are reserved.[44] In 1976, surprisingly, the Supreme Court declared an Act of Congress unconstitutional on the basis of Tenth Amendment principles.[45] *Usery* held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the wage and hour provisions of the Act to virtually all public employees. The Supreme Court declared that to the extent that the act overrode "the State's freedom to structure integral operations in areas of traditional governmental functions," such as fire, police, sanitation, public health and parks and recreation, the Act was "not within the authority granted Congress by the commerce clause." [46] The *Usery* decision, however, has been severely limited by later Supreme Court rulings.[47] In any event, the Court in *Usery* specifically noted that it was not deciding whether the Tenth Amendment was a limit on Congress' spending power, its power to enforce the Fourteenth Amendment or its war power.[48] And in *Bell* v. *New Jersey,*[49] the Court held that the states are bound by regulations attached to a federal grant voluntarily accepted by the states. The Court rejected the claim that the restrictions violated the Tenth Amendment:

> Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[50]

The potential displacement of State authority and private autonomy by S. 2568 is so extensive as to justify Dr. Michael Horowitz' conclusion that, "buttressed by the legislative history created to date, the bill if passed would largely eliminate the remaining distinctions between Federal and State, and Federal and private, concerns," [51] Nevertheless, there is no sufficient basis to expect that S. 2568, if enacted and implemented by appropriate regulations, would fail to survive a constitutional challenge in court. The decision of the Congress on S. 2568, therefore, is likely to be conclusive.

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[42] *Wickard* v. *Filburn,* 317 U.S. 11, 131 (1942).

[43] *See, for example, Detroit Police Assn.* v. *Young,* 608 F.2d 671 (6th Cir., 1979); *United Air Lines, Inc.,* v. *McMann,* 434 U.S. 192 (1977); *EEO* v. *Wyoming,* 103 S. Ct. 1054 (1983); *Assn. for Retarded Citizens* v. *Olson,* 561 F. Supp. 473 (D, N.D., 1982); *La Strange* v. *Consolidated Rail Corp.,* 687 F.2d 767 (3rd Cir., 1982).

[44] See *U.S.* v. *Darby,* 312 U.S. 100, 124 (1941).

[45] *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

[46] 426 U.S. at 852.

[47] See *Hodel* v. *Virginia Surface Mining and Reclamation Assn.,* 452 U.S. 264 (1981); *United Transportation Union* v. *Long Island Railroad Co.,* 455 U.S. 678 (1982); *Federal Energy Regulatory Commission* v. *Mississippi,* 456 U.S. 742 (1982).

[48] 426 U.S. at 852, n. 17; 426 U.S. at 854, n. 18; see *North Carolina ex rel. Morrow* v. *Califano,* 445 F. Supp. 532, 536, n. 10 (E.D., N.C., 1977), *aff'd mem.,* 435 U.S. 962 (1978); see generally, Rotunda, *Usery in the Wake of Federal Energy Regulatory Commission* v. *Mississippi,* 1 Constitutional Commentary 43 (1984).

[49] 103 S. Ct. 2187 (1983).

[50] 103 S. Ct. at 2197.

[51] Horowitz, Memorandum, supra.

It should be mentioned here that alternatives are available which would achieve the limited objective of overturning the challenged aspect of the Grove City case without inviting the difficulties involved in S. 2568.[52]

If a limited alternative is not substituted for S. 2568, and if that measure is enacted in its present form, it will effect a radical and massive expansion of federal power in the subject areas.

[The following material was supplied by James McClellan, Center for Judicial Studies:]

[Reprint from Human Events, June 9, 1984]

## CIVIL RIGHTS BILL OF 1984—A BLUEPRINT FOR TOTAL FEDERAL CONTROL

(By M. Stanton Evans)

With their usual shrewdness, the Inspector Clousseaus of our political melodrama are hot on the trail of a purely imaginary "civil rights" offender, while letting the actual culprit in the case get off scot-free.

Liberals in Congress are incensed about the recent Supreme Court decision on Grove City College, in which it was decreed that "indirect" assistance from the government subjects the school to federal sex-discrimination guidelines. This despite the fact that Grove City is fiercely independent and has long refused to accept or even administer federal aid. Some of its students, however, do receive individual grants and in turn use these to pay part of their tuition.

The court's concession to Grove City was to say the federal controls apply only to the department of the college immediately affected—in this case, the financial aid program—rather than the entire institution. This has enraged the liberals, who want the whole school in such cases (or other institution) under the thumb of federal authority, and are pushing legislation to this effect. The Reagan Administration is backpedaling on the issue, saying the decision should be amended, but not as drastically as the liberals propose.

All of this is in the obtuse tradition of Clousseau, the Peter Sellers character who always harasses some innocent party while ignoring criminal enormities that rage around him. The alleged "civil rights" offense that everyone is yammering about in Grove City is no offense at all. On the other hand, the decision contains some lethal doctrine that could be utterly destructive of private education, and a good deal else, in the United States.

What is wrong with the decision is not that it limits the scope of federal regulation at Grove City, but that it imposes any regulation at all. Since the college doesn't discriminate, accepts no federal aid, and has gone out of its way to avoid involvement in federal programs, the fact that this case should ever have arisen is a measure of the mindless zealotry of the educationist bureaucracy, even under Ronald Reagan.

Worse than the fact of such harassment, however, is the rationale behind it: The idea, invented by the bureaucrats, that "indirect" aid from the federal government is the same as "direct" assistance. That is, if "A" receives a check from government, then spends it to purchase something from "B," then "B" is also a recipient of government aid, and is subject to all the regulations, rules and guidelines that go along with federal money.

Since our society today is saturated with federal subsidy programs (promoted on the grounds that federal aid did not mean federal control), the implications of this logic are astounding. For example, supermarkets that accept food stamps, pharmacies that deal with Medicare patients, stores that cater to Social Security pensioners and scores of other institutions are also "indirect" recipients of federal money thus defined. With little adjustment in the reasoning, they too could be subject to controls.

In fact, should the "Civil Rights Bill of 1984" be enacted, all these implications will become reality. The legislation makes it clear that any "indirect" recipient of federal money is subject to controls and "indirect" recipients are defined in such sweeping terms that mom-and-pop groceries accepting food stamps, borrowers at banks transacting federal business, farmers or others with federal insurance would all be subject to its dictates.

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[52] See, for example, Senator Packwood's simple proposal (S. 2363) to amend Title IX "by striking out 'education program or activity,' and inserting in lieu thereof 'education program, activity or institution.'" More extensive coverage would be provided by Dr. Horowitz' proposal "to amend Title IX to prohibit discrimination based on race, color, national origin, age or handicap as well as sex and to provide that any assistance to an educational institution would result in coverage of all of its education programs." (Horowitz, Memorandum, supra.)

This further extension of the regulatory net is even more alarming when matched with another recent Supreme Court decree, in the Bob Jones University case. The publicized elements of this case were BJU's rule against interracial dating, alleged by government as a reason to yank its tax exemption, and the school's response that the rule is a point of religious doctrine, protected by the 1st Amendment.

In flamboyant discussion of these topics, the most important aspect of the case was generally overlooked: The contention of the Internal Revenue Service, upheld by the court, that a tax exemption from the government is the equivalent of a government grant, carrying with it controls and guidelines to insure that recipient groups are properly attuned to "public policy." Again, the implications are mind-boggling.

There are, after all, millions of people and institutions in our society that benefit from tax exemption: Churches, charitable agencies, individual homeowners. According to the doctrine propounded in the Bob Jones case, such tax exemptions are the same as direct assistance from the government—with all that this implies in terms of government control.

Taken together, the "indirect aid" and tax exemption arguments provide a total blueprint for federal control of private education—and a good deal more. That's the enormous danger with which Congress should be dealing—but, Clousseau-like, has apparently failed to notice.

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LABOR POLICY ASSOCIATION, INC.,
*Washington, DC, June 6, 1984.*

Special memorandum: XII-7.

Re the impact on private employers of the Civil Rights Act of 1984, legislation that would reverse the Supreme Court's Decision in *Grove City* v. *Bell.*

## STATUS OF THE LEGISLATION

The House and Senate will soon consider legislation that would greatly expand the reach of federal control of private employment practices and increase the number of agencies that would have jurisdiction to bring EEO enforcement proceedings. (H.R. 5490; S.2568).

The legislation is intended to reverse the Supreme Court's decision in *Grove City College* v. *Bell* which held that the Title IX of the Education Amendments of 1972 (which prohibits sex discrimination in schools) applies only to the particular department of a university that receives federal funds, and not to the entire university. At this time, the legislation appears to be on a very fast track. The House bill was reported out of the Education and Labor and Judiciary Committees by voice vote, and full House action awaits only the issuance of a Committee report. The Senate has scheduled markup of its bill by the Senate Labor and Human Resources Committee for June 13, 1984. Approval is also expected from that Committee.

Significantly, the bill under consideration go far beyond reversing the *Grove City* decision. There is a common, but erroneous, perception that they apply only to educational institutions and not the private employer community. This perception may be due partly to the fact that the *Grove City* case involved a university and arose under Title IX of the Education Amendments of 1972 which applies only to educational institutions receiving federal financial assistance. Beyond amending Title IX, however, the proposed legislation would also amend Title VI of the 1964 Civil Rights Act, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 and expand their reach to many private employers not now covered by these statutes. As Senator Packwood, one of the Senate sponsors has stated, this "is a simple bill with global ramifications." Cong. Rec. 4589 (April 12, 1984).

As discussed below, the bill is riddled with ambiguities. While there is no way to predict which interpretations will be followed by federal compliance agencies and plantiffs' attorneys, the bill as drafted opens the door to broad interpretations. The following memorandum gives background information regarding *Grove City* and discusses the implications of the legislation for private employers.

## THE "GROVE CITY" CASE

The *Grove City* case involved an interpretation of language in Title IX that limited coverage to any education "program or activity" receiving federal financial assistance. The Supreme Court held that tuition payments received by a college from students participating in a federal tuition aid program do not trigger institutionwide coverage of Title IX. The Court found that Title IX's nondiscrimination provision applied only to the college's financial aid office, and not the whole university. True, the proposed legislation would reverse this court holding, but in addition would do much more to public institutions and private employers alike.

### DELETION OF PROGRAM SPECIFICITY

The first major change made by the legislation is to modify each statute (Title VI and IX, Section 504 and the ADA of 1975) by deleting the term "program or activity" and substituting the term "recipient". For example, Section 601 of Title VI would be changed to read:

"No person in the United States shall, on ground of race, color, or national origin be denied benefits, or be subjected to discrimination by any recipient of Federal financial assistance."

As stated by Senator Kennedy, one of its sponsors, "[t]he effect of this change is to prohibit an entire institution or entity from discriminating if any of its parts receives federal funds." Cong. Rec. 4586 (April 12, 1984). This is the portion of the legislation that reverses the limited interpretation given Title IX by the Supreme Court in *Grove City* and makes that change for the other three statutes as well. Significantly, a private employer who received federal funding for a training program would now find that all the company operations would be subject to Title VI, Title IX (if the corporation is deemed to be an "education recipient"), Section 504, and the 1975 Age Discrimination Act.

### EXPANSION OF "RECIPIENT" OF FEDERAL FUNDS

The second amendment that this legislation would make in these statutes is sweeping in scope because it greatly expands the definition of federal financial "recipients" who would be covered by the statutes. None of these statutes presently defines the term "recipient", and the definition has been left to agency interpretation. But under the proposed bills, the term recipient includes: any "*private* agency, institution, or organization or other entity" (1) to which Federal financial assistance is extended, "either directly or through another entity or a person", or (2) which "receives support" from the extension of such financial aid to any of its subunits. One plausible interpretation, and one which its supporters do not deny, is that all operations of any private entity which receives its own federal funds, or receives such funds indirectly from a direct recipient of federal funds, would be covered by all four statutes.

Three examples will illustrate the scope of this legislation:

1. An entire company will be covered if any part of its operations receives assistance, such as a federally funded training program;
2. A company that sells materials or leases equipment to a federally funded project (for example, highway or bridge construction) might be receiving the federal assistance "through another entity" that receives direct federal aid. If so, the entire operations of the indirect recipient might be covered by the four statutes; and
3. A grocery store or pharmacy might be covered if it accepts food stamps or medicare payments for food or prescriptions.

Sponsors of the legislation readily admit that the first example gives the exact outcome that is intended by the bills. The second example is plausible from a direct application of the language of the new definition of "recipient." The third example is denied by the sponsors of the legislation, but the Department of Justice has argued strenuously that indirect recipients of federal funds (such as grocery stores, pharmacies, landlords, etc.) would come within the new definition. Equally sweeping for the public sector, many have argued that under these bills, if one governmental entity in a state receives any federal funds, the entire state government could be covered.

### MULTIPLE ENFORCEMENT AGENCIES

In the past, considerable confusion and duplication of effort has resulted from the fact that discrimination claims against an employer might be investigated or litigated in several different forums (e.g., EEOC; OFCCP; federal suits; state agencies and state private suits; and grievance and arbitration procedures). The problems would be expanded if the pending legislation were enacted. If one or more parts of a private entity (such as a corporation) received federal aid from different funding agencies, or if any branch of a private entity sold or rented goods or services to direct recipients for use on federally-funded projects, any number of federal agencies could have jurisdiction over all the operations of the company. Each agency, in turn, would be able to enforce the four statutes.

This possibility of multiple agency enforcement against direct or indirect recipients raises a strong chance for a replay of the confusion and lock of direction previously faced by federal contractors. Until enforcement was consolidated in the Office of Federal Contract Compliance Programs, each federal contracting agency conducted its own enforcement program. Federal contractors faced different legal standards, depending upon the agency involved.

The problems caused by such multiple jurisdiction include the following:

1. Many agencies do not have the expertise to handle civil rights problems, which are best left to EEOC and OFCCP for enforcement;
2. Confusion of legal standards and agency enforcement practices inevitably results from a lack of a central coordinating authority;
3. Private employers often are subjected to multiple compliance reviews and reporting requirements; and
4. Numerous agencies are available with which an individual can file the same complaints.

To add to the confusion, "[u]nder the bill, the government funding agency may still refer cases of discrimination to the Justice Department, which can sue in the federal courts to stop the discrimination." Statement of Senator Kennedy, Cong. Rec. 4587 (April 12, 1984). The Justice Department would be able to "sue in Federal district court for injunctive and other appropriate relief." Remarks of Senator Cranston, Cong, Rec. 4590 (April 12, 1984). Under present law, the Justice Department has authority only over state and local governments; the EEOC handles cases against private employers.

There presently is confusion, for example, between the Department of Justice and the EEOC on the proper breath of affirmative action. Recently, the two agencies have disagreed on whether such relief may ever be given to persons who are not victims of proven discrimination. In a recent case involving the New Orleans police department, the EEOC prepared a brief that directly confronted the Justice Department position that such relief is limited to identifiable victims. The EEOC did not file its brief on this issue only because of a determination that EEOC does not have jurisdiction to file in a public sector case. But should the Justice Department obtain Title VI federal funding jurisdiction over private employers, the possibility of conflicting legal standards is obvious.

Another point of potential confusion is illustrated by past experience with OFCCP, which took the position that it had legal authority to attack seniority systems that were legal under Title VII. Only after losing in court did the OFCCP agree to accept Title VII standards. See *United States* v. *Trucking Management, Inc.*, 662 F. 2d 36 (D.C. Cir. 1981); *United States* v. *East Texas Motor Freight System*, 564 F. 2d 179 (5th Cir. 1977). There could be no assurance that future administrations would abide by the Reagan administration's OFCCP's decision to acquiesce in these decisions except in these two circuits. This raises the spectre of Title VI enforcement (involving race discrimination) that could be contrary to Title VII. While such an agency position would seem to have little legal foundation, that fact alone has not deterred past administrations from pursuing such a course of action.

A further source of confusion could result from the present lack of a government position on the issue of comparable worth. EEOC has resisted investigating sex-based wage discrimination claims alleging that different jobs that are "worth" the same should be paid the same. While the law is developing, there is the possibility of differing enforcement standards under Title IX coming out of federal funding enforcement agencies.

## PRIVATE RIGHT OF ACTION

Another source of confusion would be the existence of a private right of action to bring federal court suits against federal funds recipients. Title IX and Section 504 already have been construed to permit such a right. *See, e.g., Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) (Title X). There is a good chance that Title VI and the Age Discrimination Act of 1975 would have such a right since all four statutes were patterned after one another. As stated by Senator Kennedy, Cong. Rec. 4587 (April 12, 1984), for "each of the four statutes", the bill is intended to preserve "specific portions of case law which confirmed the private rights of action and coverage of employment."

There is, of course, no administrative limit that could be place on private plaintiffs as far as the legal theories they would pursue. In addition, none of these statutes require the same procedural steps to be taken to process a charge (e.g., timely charge filing, conciliation, and issuance of a right-to-sue letter) as are found in Title VII. There also would not be any bar to private litigants pursuing these private remedies in addition to filing charges with EEOC and OFCCP. Moreover, 42 U.S.C. § 1988 permits an award of attorneys' fees to prevailing plaintiffs in suits brought under Titles VI and IX.

There is nothing in the legislative history to date that would stop the confusion and multiple enforcement possibilities inherent in this legislation. To the contrary, sponsors of the bill have stressed that each of these laws should be given "broad and comprehensive coverage." Cong. Rec. 4587 (April 12, 1984)(Senator Kennedy). Likewise, Senator Packwood stressed that "our intention has been expansion of the protections of the orginial Civil Rights Act; this purpose is not served by anything but the broadest interpretations of the laws." (*Id.* at 4589). Without some limitations either in the legislation itself or in legislative colloquies, there is a strong possibility of increased confusion in federal rights enforcement against private employers who already are subject to multiple enforcement proceedings.

## CONCLUSION

Private employers who now face the possiblity of litigating a single claim of discrimination in several different forums could have this burden increased substantially if the proposed legislation were passed. Any employer who sold goods or performed services for federal funds, or who received payment for services or goods from other federal funds recipients, would be subject to compliance investigations from any number of federal agencies which now do not have jurisdiction under present law. This jurisdiction would cover the entire operations of each of these companies. Private plaintiffs also would obtain broader rights to sue employers.

For example, under present law, a contractor accused of sex discrimination by one person could face proceedings from:

EEOC; OFCCP; Federal court plaintiffs under 42 U.S.C. § 1981; State FEP agencies; State court plaintiffs; and Arbitration or other alternate dispute resolution procedures.

Under the proposed legislation, they would face additional discrimination proceedings from:

Any number of federal funding agencies from which the employer receives direct or indirect government funds;

For violations of:

Title VI (race discrimination); Title IX (sex discrimination); Section 504 (handicap discrimination); or The Age Discrimination Act of 1975.

Unless the proposed legislation is significantly narrowed to (1) define recipients as only those who directly receive federal funds and (2) amended to make only one agency responsible for handling a particular charge of discrimination, federal civil rights enforcement procedures could become unnecessarily duplicative and pose the likely prospect of confused and inconsistent legal standards.

JEFFREY C. MCGUINESS,
*Vice President and General Counsel.*
DOUGLAS S. MCDOWELL,
*Counsel to the Labor Policy Association.*

[Reprint from the Wall Street Journal, June 12, 1984]

## GROVE CITY CHOO-CHOO

"It's moving through the House like a steamroller," a congressional aide said. "Some piece of legislation like it is inevitable," a Reagan official judged grimly. They were talking about the Civil Rights Act of 1984, in which Congress set out to reverse a Supreme Court decision and has come up with a gross, irresponsible, truly off-the-wall mess.

Over the past 20 years civil rights enforcement has increasingly become an intellectually dishonest cat-and-mouse game. Various people in Washington want a better deal for minority groups. But national officials cannot just order everybody to straighten up and fly right, because annoying Constitutional obstacles like federalism stand in the way. So Washington acts indirectly, by putting strings on the federal money it hands out. Other institutions fight back by refusing to take the money, and so it goes.

Grove City College is one of those organizations that have tried to avoid federal control by refusing federal money. But some of its students take federal financial aid, and late this winter the Supreme Court said that even this indirect aid made the college subject to federal regulations. This was the liberal part of the decision.

There was also a conservative part. The court said that if an educational program within a school got federal funds, only this program had to follow the federal rules on sex discrimination. The whole institution did not automatically fall under the blanket.

Liberals in Congress immediately drafted the Civil Rights Act of 1984 to expunge the conservative part of the court's position. This bill says that when you take the federal dollar your whole school, or agency, or organization, or state or local government, or just about anything at all comes under federal oversight. Moreover, the bill calls for this expanded federal reach not only with sex discrimination in schools but in laws banning discriminations of all sorts in all sorts of places.

The upshot is that federal regulations—complete with quotas and private-enforcement suits—would apply to just about anyone who gets federal money of any sort, even if indirectly. This includes approximately all of us. You need not be a hysterical right-winger to envision the enforcement nightmare.

These sorts of excesses do not occur by random accident. They happen because civil rights proponents do not think about the institutions they will vitiate through bureaucratic second guessing in their passion to insure that no culprit escapes through an inadvertent loophole. The problem is not that they love minorities so much but that they have no similar love for other citizens.

If we are lucky, the Senate may slow down the Civil Rights Act of 1984 so that someone can make mitigating fixes. But it will take a lot more to repair the underlying assumptions that cause these headaches again and again.

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[Reprint from the Wall Street Journal, May 23, 1984]

## CIVIL RIGHTS IN NEWSPEAK

(By Chester E. Finn Jr.[1])

For a time it appeared we might make it through the year without anything Orwellian happening, at least within American borders. Now, however, barring a big surprise, we must expect Congress soon to pass and the president to sign a far-reaching law that the author of "1984" might have imagined. That this is being done in the name of public virtue—the rooting out of discrimination—Orwell would have assumed. That is consequences have not been carefully examined, save perhaps by those who welcome them, he would have expected. That it is named the "Civil Rights Act of 1984," he would have found apt.

This remarkable extension of federal regulatory authority is in fact a much-exaggerated election-year response to a quite specific situation that the Supreme Court created in late February. Its decision in *Grove City College* vs. *Bell* altered the canon of civil-rights enforcement in two significant ways. First, the court asserted that federal financial assistance given directly to students is indistinguishable from aid to the college they attend; thus even if a private college hoping to preserve its independence eschews all direct government funding, as Grove City has systematically done, the receipt of a single grant by a single student is sufficient to trigger whatever regulations are attached to federal institutional support.

Second, the Supreme Court held that Title IX (of the Education Amendments of 1972), which was intended to bar sex discrimination in schools and colleges, was not applicable to the entirety of the institutions but only to "education program[s] or activit[ies] receiving federal financial assistance." Thus one could—and feminist groups quickly did—imagine that sex discrimination might be prohibited in the admissions office and the chemistry lab, should both receive government money, but not in the history classroom or on the soccer field.

### SEEN AS SETBACK

Though the first part of the Grove City decision constituted a historic enlargement of federal control (and was quietly celebrated by advocates of such things), the second part was seen as a setback for civil rights. While it was generally conceded in Washington that the "legislative history" of Title IX was ambiguous about just how far into the operations of an educational institution Congress had meant to push the prohibition against gender bias in 1972, in practice the Office for Civil Rights had promulgated and was enforcing elaborate regulations covering nearly all school and college activities of an "educational" sort. Were Grove City to be the last word, such enforcement would have to be scaled back to the programs and departments actually receiving government aid.

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[1] Mr. Finn is a professor of education and public policy at Vanderbilt University.

Within hours of the Supreme Court's action, confronted on one hand by the coming election and on the other by the cries and lamentations of civil-rights groups, members of Congress pledged to restore Title IX to its prior dimensions. And although the Justice Department had in fact sought the decision that the Supreme Court rendered, spokesmen for the Reagan administration—also facing an election—quickly made plain that they would welcome corrective legislation.

The offending portion of the Grove City decision might, of course, have been undone by a precisely drafted measure amending Title IX to stipulate that any federal assistance to a school or college will subject *all* the educational activities of the institution to the norms of nondiscrimination—the very assumption on which the enforcers had previously been operating. But Congress reached for a multiwarhead missile instead of a rifle.

It turns out that the key phrase in Title IX—"program or activity receiving Federal financial assistance"—is repeated in the three general statutes barring discrimination on the basis or race, color, national origin, age and handicap. Not being limited to educational institutions, these are much broader laws and are enforced (albeit in dissimilar ways) by essentially every agency in Washington that proffers any kind of financial aid to any kind of public or private institution. Hence the possibility existed that the judicial reasoning behind Grove City might lead to constraints on other civil-rights enforcement procedures. More important, undoing Grove City presented civil-rights activists and their congressional champions an unparalleled opportunity to extend the federal regulatory reach much farther into the organizations and institutions of American society than it has ever been before.

Accordingly, S. 2568 (introduced by Sen. Edward Kennedy on April 12 and already co-sponsored by 61 senators of both parties) and its companion House bill would amend all four of the key laws in similar fashion: A "recipient" of federal aid is redefined to mean any state, locality or subdivision thereof, any "public or private agency, institution, or organization, or other entity," and "any successor, assignee, or transferee" or any subunit thereof that receives any federal financial assistance, including any aid channeled indirectly "through another entity or a person."

In short, assistance of any kind to any part of any public or private enterprise will trigger all the civil-rights regulations and enforcement procedures of all the cognizant federal agencies with respect to all other parts of the enterprise, however remote they may be from the part being aided. If a state education department receives funds from the U.S. Education Department (as they all do), the Office for Civil Rights gains jurisdiction over that state's highway department. If a municipal hospital is assisted by the Public Health Service, the city's police and fire departments will become subject to challenge by the Department of Health and Human Services if they reject job applicants with heart conditions.

The regulatory burden will be heavy, but it might be bearable if elimination of willful discrimination were the end of it. In fact, however, many federal agencies have long since built into their anti-discrimination regulations and procedures various "effects" tests, quotas and other "outcome" standards that may foster reverse discrimination. Just last year, the Supreme Court acknowledged that while Title VI (which bars race bias in federally assisted activities) prohibits only *international* discrimination, agency regulations designed to enforce it may also prohibit all practices that have a "disproportionate impact," regardless of intent. Thus, for example, the Justice Department's Title VI regulations provide that "a recipient . . . may not . . . utilize criteria or methods of administration which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin." The Education Department permits "special arrangements" for "groups previously subjected to discrimination" even though "past discriminatory practices . . . have been abandoned." The Small Business Administration mandates such arrangements.

The composite effect of extending such "standards" to all activities of public and private "entities," and of subjecting each to the disparate interpretations of multiple agencies and judges, cannot be fully discerned in advance—which is precisely why the speed and heedlessness with which Congress is acting hold genuine risks. One imagines, for example, that federal support for any part of a state government will henceforth intrude "equality of outcome" into the licensing and professional certifications carried out by all state agencies or under color of state law—including tests given to teachers, lawyers, dental hygienists and accountants. Since the standard of the most extreme federal agency will inevitably prevail, we can expect that one day the Office for Civil Rights will monitor the examinations given to civil engineers in New York or Idaho and that the structural reliability of tomorrow's bridges will thus depend in part on whether the results of the engineers' exams are sufficiently responsive to the interests of protected classes within the population. While it may not turn out to be true, as some have suggested, that every corner store that accepts food stamps will be obliged to install ramps for the handicapped, this will only be through explicit exemption from such requirements.

### POWERFUL NEW TOOLS

Nor will it be necessary for a federal agency to initiate enforcement proceedings. Under existing legal precedents, any lawyer representing an aggrieved person may go into court to seek redress. Under the new law, an enterprising attorney whose handicapped client found it hard to get in the door of the public library could not only take the library to court for redress—he could also seek revenge on the sanitation and parks departments. Since the defendants wind up paying lawyers' fees incurred by successful plaintiffs, this could well turn out to be the largest windfall ever for the legal profession.

Finally, it must be noted that the new legislation puts powerful new tools into the hands of those opposed to quotas and setasides as well as those favoring such mechanisms. Washington, D.C., for example, has quotas for "minority participation" in urban redevelopment projects (and cable television). Under the "Civil Rights Act of 1984," these would clearly be vulnerable to challenge on grounds of "reverse discrimination" by the Justice Department or by any aggrieved individual. So would a host of affirmative-action programs in hundreds of public and private agencies. Nor would it take a lot of bureaucratic or judicial ingenuity to make every hospital, clinic, nursing home and doctor's office in the country subject to the "Baby Doe" regulations.

This legislation is barreling through Congress with essentially no opposition. The hearings are mostly cheering sessions by advocacy groups. The Reagan administration, riven by internal dissension over principles and politics, is equivocating. And somewhere, one imagines, George Orwell is smiling ruefully.

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CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
*Washington, DC, July 2, 1984.*

Hon. JESSE A. HELMS,
*Chairman, Committee on Agriculture, Nutrition and Forestry, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: On behalf of the Chamber's nearly 200,000 business members, more than 85 percent of whom are small firms with less than 100 employees, I am pleased to comment on S. 2568, the Civil Rights Act of 1984.

While the Chamber has no position with respect to S. 2568, we remain firmly committed to the goal of equal employment opportunity for all. (In view of the bill's potential scope, the Chamber has begun to develop policy. A position is expected in the very near future.) We are concerned about the lack of adequate deliberation and the exceptionally rapid consideration of this bill in view of its potentially wide-ranging impact and ramifications.

Proponents of S. 2568 offered this bill as a simple repeal of the February 28, 1984 Supreme Court decision in *Grove City College* v. *Bell*. This decision held that federal tuition grants to students do not trigger college-wide coverage of programs under Title IX of the Education Act Amendments of 1972. Many persons now believe that S. 2568 could have a much broader impact on both the public and private sectors.

S. 2568 amends not only Title IX but three other significant civil rights statutes: Title VI of the 1964 Civil Rights Act; Section 504 of Rehabilitation Act of 1973; and The Age Discrimination Act of 1975.

Such a broad-reaching bill deserves careful analysis and deliberation because of its legal, policy and constitutional ramifications.

The United States Commission on Civil Rights, the Department of Justice, many members of the academic community and other concerned and potentially affected parties have raised serious questions and concerns about the bill. Many concerns have not been adequately addressed; many questions remain unanswered.

These concerns include:

Effect on the relationship between federal and state governments;

Expansion of federal control of private employment practices;

Ambiguities in the definitions of crucial terms, such as "recipient," "transferee" and "federal aid";

Administration and enforcement; and

Expansion of private rights of action.

Examples of questions of concern to the business community remaining unanswered include:

Whether grocery stores will be subject to regulation because they accept food stamps?

Whether farmers who receive crop subsidies would be subject to regulations?

Whether pharmacists would be subject to regulation because they receive payment from Medicare or Medicaid?

Whether suppliers of durable medical equipment would be subject to regulation if they take assignments from their customers of Medicare (Part B) reimbursements?

These are not frivolous questions. For example, the Report by the House Judiciary Committee on H.R. 5490, which is identical to S. 2568 in virtually all respects, seems to indicate an intention to extend coverage to businesses involved in the Food Stamp Program. See H. Rept. 98-829, April 12, 1984 at p. 31.

Questions such as these should be addressed directly and answered by Congress—and not left to future determination by a judge or regulatory agency. Legislative inquiry and deliberate analysis is not opposition to civil rights.

For the foregoing reasons, the Chamber believes that S. 2568 has not received adequate consideration or deliberation by the Senate. Changes in our civil rights laws of the apparent magnitude contemplated by this bill should not be adopted hastily, inadvertently, or without the development of a meaningful legislative history.

Thank you for your consideration of our views. Please include this letter as part of the hearings record.

Sincerely,

Albert D. Bourland.

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National Council of Farmer Cooperatives,
*June 20, 1984.*

Hon. Jesse Helms,
*Chairman, Committee of Agriculture, Nutrition, and Forestry, U.S. Senate, Washington, DC.*

Dear Mr. Chairman: The National Council of Farmer Cooperatives appreciates the opportunity to comment on S. 2568. The NCFC is concerned with the potentially far-reaching effects S. 2568 may have on individual farmers. Though the NCFC takes no position on the advisability of legislatively negating the Supreme Courts' decision in *Grove City College* v. *Bell*, we do oppose passage of S. 2568 in its present form.

S. 2568 would appear to bring everyone receiving federal funds within the scope of the Civil Rights, Rehabilitation and Age Discrimination Acts. As presently worded, S. 2568 would require any farmer receiving federal financial assistance, such as price support loans, to comply with these Acts. The expense of compliance, the prospects of restrictive regulatory intrusion into the day-to-day farming activities, and the cost of enforcement arising out of S. 2568's application to farmers is an unnecessary and harmful burden on a group of people who are faced with far greater concerns.

We agree with USDA General Counsel Daniel Oliver's opinion that the language of S. 2568 is "broad, vague and little understood". If proponents of the bill wish only to reverse the *Grove City College* decision, S. 2568 should be succinctly drafted to cover that particular issue.

Sincerely,

Wayne A. Boutwell, *President.*

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National Milk Producers Federation,
*Arlington, VA, June 27, 1984.*

Hon. Jesse Helms,
*Chairman, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, Washington, DC.*

Dear Mr. Chairman: Thank you for your letter of June 7 with reference to the potential impact provisions of S. 2568 on agricultural programs, producers and agribusiness.

As you are aware, this legislation is outside the framework of issues normally addressed by the National Milk Producers Federation and one in which we have little specific expertise. Therefore, the information provided in your letter and the enclosed statements from the Departments of Justice and Agriculture are most helpful.

If, as pointed out by the General Counsel of the Department of Agriculture, the provisions of this legislation could result in an inadvertent extension of coverage to programs such as the Department's price stabilization efforts, it would appear that this would be substantially beyond the thrust and target of the legislation.

We would trust that in the consideration of S. 2568, this question will be examined and, either by specific amendment or through the legislative history developed in connection with the measure, these questions will be resolved so that unintended application of the legislation will not result.

Sincerely,

PATRICK B. HEALY,
*Chief Executive Officer.*

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CAMPBELL UNIVERSITY,
*Buies Creek, NC, May 9, 1984.*

Hon. JESSE HELMS,
*U.S. Senator,*
*Dirksen Building, Washington, DC.*

DEAR SENATOR HELMS: Enclosed is a resolution which President Wiggins and I were instructed by the Board of Trustees of Campbell University to send to each member of North Carolina Congressional delegation. I understand that President Wiggins has already written to each member of the delegation setting forth his opposition to S. 2363 and H.R. 5011, having to do with Title IX.

The purpose of this letter is to inform you that our Board, after careful consideration of the matter, believes that the proposed legislative end run around the "program specific" concept of Title IX as laid down in the Grove City College Case would be detrimental to education in general and private education in particular by opening the way for endless legal entanglements. It is the opinion of our Board that such legislation will destroy the protections that private institutions have enjoyed since the founding of this Republic. We believe that the destruction of the distinctive meanings between the public and private sectors will be exceedingly costly to both the institutions and to the Nation. Indeed, we can see no discernible benefits coming from the proposed legislation. Again, on behalf of the Board of Trustees of Campbell University and its president, Dr. Norman A. Wiggins and on my own behalf, I would urge your opposition and your seeking the opposition from others in the House and Senate to any effort to change the basic nature of the "program specific" concept which was so clearly spelled out in the original Civil Rights Act of 1964 and which was reaffirmed in the Grove City College Case.

Thank you for your kind consideration of this important matter.

Sincerely,

J. LEON RUMLEY,
*Chairman, Board of Trustees.*

Enclosure.

### RESOLUTION IN OPPOSITION TO S. 2363 AND H.R. 5011

The Board of Trustees of Campbell University, Buies Creek, North Carolina, does this day, May 4, 1984, adopt the following resolution:

Whereas, the United States Supreme Court in the recent case of Grove City College did find that programs of colleges and universities are not subject to Title IX unless those programs are specifically funded by Federal funds; and

Whereas, in the aftermath of the Grove City Case, legislation has been introduced in the House, H.R. 5011 and in the Senate, S. 2363, which if adopted would destroy the "program specific" concept as laid down in the Grove City Case and which was a part of the original Civil Rights Act of 1964; and

Whereas, the adoption of such legislation would be highly expensive both to the Federal government and to the institutions that would come under government regulations; and

Whereas, no discrimination was shown in the Grove City College Case and there is no evidence of any discrimination on campuses of colleges and universities across the Nation; and

Whereas, the proposed legislation, if adopted, would eradicate the protection that private institutions have enjoyed since the founding of this Republic, the Board of Trustees of Campbell University hereby calls upon the Congressional delegation of North Carolina to take whatever action necessary to prevent this unfortunate proposal from becoming the law of the land.

*Be it resolved,* That the Chairman of the Board of Campbell University, Mr. J. Leon Rumley, and the president of the university, Dr. Norman A. Wiggins, be directed to send a copy of this resolution along with the names and addresses of the members of the Board of Trustees of Campbell University to the North Carolina Congressional delegation requesting the members to consider seriously opposing the proposed legislation.

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CAMPBELL UNIVERSITY,
*Buies Creek, NC, May 28, 1984.*

Hon. JESSE HELMS,
*U.S. Senator,*
*Dirksen Building, Washington, DC.*

DEAR SENATOR HELMS: I am Norman Wiggins, president of Campbell University. Also, I have in recent years had the privilege of serving as President of the National Association of College and University Attorneys and President of the American Association of Presidents of Independent Colleges and Universities, being the immediate past president of this latter organization. Presently, I serve as president of the North Carolina Baptist State Convention, president-elect of the North Carolina Association of Colleges and Universities, a member of the Board of Directors of the Christian College Coalition, a member of the Judiciary Committee of the National Association of Independent Colleges and Universities, a member of the Education Committee of the Baptist World Alliance, a member of the Legal Affairs Committee of the Education Commission of the Southern Baptist Convention, and a member of the Executive Committee of the North Carolina Association of Independent Colleges and Universities. In this instance, however, I speak only for my university and would at the outset express my appreciation for the privilege of submitting to you and your committee our comments concerning S 2568:

"A bill to clarify the application of Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964."

Campbell University is the third largest university in North Carolina. Annually, including the summer sessions, it serves in excess of 5,000 students. It is one of the seven schools related to the North Carolina Baptist State Convention. It is not and has never been sectarian and is committed to a policy of non-discrimination and equal opportunity for those wishing to enroll as students.

Campbell University receives no direct Federal aid. It does, however, admit students who receive financial aid, both from State and Federal governments. Although the university has borrowed funds for the building of residence halls, it has never received a federal grant for the construction of a building. Other grants received by the university have been in areas of what we would consider as a services rendered contract whereby the university has rendered services in return for receiving Federal funds. Generally, such programs in which we have entered have been for the education of high school teachers and for the updating of basic skills of students whose education did not afford them the opportunity to gain such skills during their elementary and secondary school experiences.

Campbell University has always believed that governmental regulations should be restricted to areas in which the government has a legitimate governmental interest to protect. For example, we believe that such regulations should insure that government funds are expended for the purpose for which they are provided; that they insure that government funds are not expended in any ways which are inimical to legitimate governmental objectives and that such regulations make certain that government property and facilities acquired with government funds or financing are used without unlawful discrimination and in other respects consistent with applicable law. In addition, we believe that laws and regulations affecting education must be written so as to protect and minimize interference with academic freedom of both state and independent colleges and universities and their personnel. Furthermore, we believe that in order to strengthen our pluralistic system, such laws and regulations should distinguish, where appropriate, between publicly sponsored and independently sponsored institutions and that the constitutional freedoms of those independent institutions controlled by churches should always be honored.

We have always believed that government regulations should be limited to the programs directly assisted and that they should be appropriate to both the level and duration of the support provided. Also, we have assumed that the application of government regulations would not be premised upon the receipt of government financial assistance by students. In other words, having refused every form of financial aid other than aid based upon services rendered, we were of the opinion that Federal student aid alone would not make a university "a recipient" of federal funds within the meaning of Title IX. Even if it did, we assumed that only programs supported by Federal funds would be subject to governmental control. The supreme court in the Grove City College case reaffirmed our beliefs.

In the light of the long history of financial aid to students and in the absence of any evidence of discrimination on the part of educational institutions, it seems strange at least and unwise at best for legislation to be adopted which if carried to its logical extreme would encompass almost every institution, every business, and indeed almost every financial activity involving the transfer or exchange of federal funds. So far as we have been able to determine, there is neither any evidence nor any allegation of any discrimination on the campuses of American colleges and universities.

Again, Campbell University has received no direct federal aid in the building of its campus. In order that we might remain independent of government control and pursue our own educational purposes, we have always striven to secure our support from private sources. In so doing, we have assumed that we were serving our government, our students, and our supporters.

In the Grove City College Case, the Supreme Court of the United States held that enrollment of students receiving Federal aid made the college a "recipient" of assistance. The court went on, however, to hold that government regulation would be limited to those "specific programs" receiving Federal support. Although the decision in Grove City came as a surprise and a disappointment, it was generally believed that colleges and universities receiving no direct financial assistance could survive under the "program specific concept." S 2568 is designed, however, to abolish the "program specific concept." The matter of survival for many private colleges is not so clear if the "program specific concept" is abolished.

It seems reasonable to believe that if S 2568 is adopted, it will result in demands for greatly increased support from the Federal government. If government control comes upon the mere receipt of a check from a student receiving financial aid, what incentive will the institution have for continuing to secure funds from private sources?

If S 2568 is adopted, who will pay the costs of the operation of the Title IX compliance office of each institution? It would seem that this would ultimately have to be borne by the Federal government inasmuch as the majority of private institutions do not have sufficient funds to support such additional activity.

In closing, permit me to suggest that inasmuch as Title IX is being reexamined, careful attention should be given to clarifying the language of the present regulations as they relate to religious and moral values. Many believe the regulations presently establish an official orthodoxy about such matters as the role of the sexes in society, attitudes about the institutions of marriage and the family and the matter of sexual morality.

Again, I would urge that no action be taken on S 2568 until there can be a thorough study on its impact on colleges and universities receiving no direct federal assistance.

Thank you again,

Sincerely,

NORMAN A. WIGGINS, *President.*

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CAMPBELL UNIVERSITY,
*Buies Creek, NC, June 1, 1984.*

Hon. JESSE HELMS,
*U.S. Senator,*
*Dirksen Building, Washington, DC.*

DEAR SENATOR HELMS: Enclosed is a copy of a resolution adopted by the General Board of the N.C. Baptist State Convention on Tuesday, May 29, 1984, setting forth our concern as to H.R. 5490 and S. 2568, the Civil Rights Act of 1984.

As President of the North Carolina Baptist State Convention, I want again to express my concern about the proposed amendments to Title IX and to urge you to delay action on the bill until the far-reaching impact of its provisions on those colleges and universities receiving no direct federal assistance can be studied.

Thank you again for your consideration of what we believe is one of the most important issues ever to confront private higher education.

Sincerely,

NORMAN A. WIGGINS, *President.*

## RESOLUTION

Whereas Baptists believe that Government regulations of higher education should be restricted to areas in which government has a legitimate interest, and

Whereas Baptists believe government regulations based on the receipt of financial assistance should be limited to the programs directly assisted and appropriate to both the level and duration of support provided, and

Whereas Baptists believe government regulation should not be premised upon the receipt of government financial assistance by its students, and

Whereas many independent, private colleges, especially Baptist colleges and universities, receive no direct financial aid, and

Whereas, Baptist colleges and universities have made determined efforts over many years to finance their own operations from the private sector, and

Whereas such Baptist colleges and universities have been motivated to finance their own operations because of their intense desire to remain independent of government control, in order to preserve distinctive educational missions, and

Whereas before the introduction of H.R. 5490, S. 2568 and the Grove City College case, Baptist colleges and universities, having refused every form of federal aid and having believed that student aid alone did not make such institutions "recipients" of federal funds within the meaning of the law, and

Whereas the Council on Christian Higher Education, did conclude this day that the adoption of H.R. 5490, and S. 2568 would destroy these time-proven concepts of independency that Baptists believe in, and

Whereas institutions of higher education of the Baptist denomination are deeply committed as a matter of conscience to the goals of nondiscrimination and equal opportunity in higher education: Now, therefore be it

*Resolved,* The General Board of the Baptist State Convention meeting this day, May 29, 1984, meeting in session at Wingate College in Wingate, North Carolina, does hereby call upon the North Carolina congressional delegation to take whatever measures that are necessary to delay action on H.R. 5490, and S. 2568 inasmuch as it is believed that such legislation might constitute inappropriate invasions of religious values held dear by many in society including Baptists and establish an official orthodoxy about value questions which the Board believes is not the proper province of the Government; and be it further

*Resolved,* That the Board urges the North Carolina congressional delegation to find a way to protect the imperiled interests of colleges and universities receiving no direct financial assistance.

98TH CONGRESS
2D SESSION

# S. 2568

To clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

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## IN THE SENATE OF THE UNITED STATES

April 12 (legislative day, March 26), 1984

Mr. Kennedy (for himself, Mr. Packwood, Mr. Pell, Mr. Dole, Mr. Cranston, Mr. Stafford, Mr. Leahy, Mr. Weicker, Mr. Moynihan, Mr. Stevens, Mr. Baker, Mr. Baucus, Mr. Bentsen, Mr. Biden, Mr. Bingaman, Mr. Boschwitz, Mr. Bumpers, Mr. Bradley, Mr. Burdick, Mr. Byrd, Mr. Chafee, Mr. Chiles, Mr. Cohen, Mr. Danforth, Mr. DeConcini, Mr. Dixon, Mr. Dodd, Mr. Domenici, Mr. Durenberger, Mr. Eagleton, Mr. Evans, Mr. Exon, Mr. Ford, Mr. Glenn, Mr. Gorton, Mr. Hart, Mr. Heinz, Mr. Hollings, Mr. Huddleston, Mr. Inouye, Mr. Johnston, Mrs. Kassebaum, Mr. Lautenberg, Mr. Levin, Mr. Mathias, Mr. Matsunaga, Mr. Melcher, Mr. Metzenbaum, Mr. Mitchell, Mr. Percy, Mr. Proxmire, Mr. Quayle, Mr. Randolph, Mr. Riegle, Mr. Rudman, Mr. Sarbanes, Mr. Sasser, Mr. Specter, and Mr. Tsongas) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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# A BILL

To clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Civil Rights Act of 1984".

SEC. 2. (a) The matter preceding clause (1) of section 901(a) of the Education Amendments of 1972 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits"; and

(3) by striking out "under any education program or activity receiving" and inserting in lieu thereof "by any education recipient of".

(b) Section 901(c) of the Act is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:

"(2) For the purpose of this title, the term 'recipient' means—

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

(c)(1) The first sentence of section 902 of the Act is amended—

(A) by striking out "to any education program or activity" and inserting in lieu thereof "for education"; and

(B) by striking out "such program or activity" and inserting in lieu thereof "recipients".

(2) The third sentence of section 902 of the Act is amended—

(A) by striking out "under such program or activity";

(B) by striking out "to whom" each time it appears in clause (1) and inserting in lieu thereof "to which" each such time;

(C) by striking out "program, or part thereof, in which" and inserting in lieu thereof "assistance which supports"; and

(D) by striking out "has been so found" and inserting in lieu thereof "so found".

(3) Section 903 is amended by striking out "1002" and inserting in lieu thereof "902".

SEC. 3. (a) Section 504 of the Rehabilitation Act of 1973 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "his" and inserting in lieu thereof "such individual's";

(2) by striking out "in" the third time it appears;

(3) by striking out "the benefits of" and inserting in lieu thereof "benefits";

(4) by striking out "under any program or activity receiving" and inserting in lieu thereof "by any recipient of"; and

(5) by striking out "under any program or activity conducted".

(b) Section 504 of the Act is further amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsection:

"(b) For the purpose of this section, the term 'recipient' means—

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

(c) Section 505(a)(2) of the Act is amended by inserting ", as amended," after "1964".

SEC. 4. (a) Section 302 of the Age Discrimination Act of 1975 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in programs or activities receiving" and inserting in lieu thereof "by recipients of"; and

(2) by striking out "programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)" and inserting in lieu thereof "recipients of funds under chapter 67 of title 31, United States Code".

(b) Section 303 of the Act is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits";

(3) by striking out "under, any program or activity receiving" and inserting in lieu thereof "by any recipient of".

(c)(1) Section 304(a)(4) of the Act is amended by striking out "to any program or activity".

(2) Section 304(b)(1) of the Act is amended—

(A) by striking out ", in the program or activity involved";

(B) by striking out "operation" in clause (A) and inserting in lieu thereof "operations of the recipient"; and

(C) by striking out "of such program or activity" in clause (A) and inserting in lieu thereof "in furtherance of which the Federal financial assistance is used".

(3) Section 304(c)(1) of the Act is amended by striking out "any program or activity receiving".

(d)(1) Section 305(a)(1) of the Act is amended by striking out "under the program or activity involved".

(2)(A) The second sentence of section 305(b) of the Act is amended by striking out "the particular program or activity, or part of such program or activity, with respect to which such finding has been made" and inserting in lieu thereof "assistance which supports the noncompliance so found".

(B) The third sentence of such section is amended to read as follows: "No such termination or refusal shall be based in whole or in part on any finding with respect to any noncompliance which is not supported by such assistance.".

(3) Section 305(e)(1) of the Act is amended by striking out "Act by any program or activity receiving Federal financial assistance" and inserting in lieu thereof "title".

(e) Section 309 of the Act is amended by—

(1) by striking out "and" at the end of clause (2);

(2) by striking out the period at the end of clause (3) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding at the end thereof the following new clause:

"(4) the term 'recipient' means—

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

SEC. 5. (a) Section 601 of the Civil Rights Act of 1964 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits"; and

(3) by striking out "under any program or activity receiving" and inserting in lieu thereof "by any recipient of".

(b)(1) The first sentence of section 602 of the Act is amended by striking out "program or activity" each time it appears and inserting in lieu thereof "recipient" each such time.

(2) The third sentence of section 602 of the Act is amended—

(A) by striking out "under such program or activity" in clause (1);

(B) by striking out "to whom" each time it appears in clause (1) and inserting in lieu thereof "to which" each such time;

(C) by striking out "program, or part thereof, in which" in clause (1) and inserting in lieu thereof "assistance which supports"; and

(D) by striking out "has been so found" in clause (1) and inserting in lieu thereof "so found".

(c) Title VI of the Act is amended by adding at the end thereof the following new section:

"SEC. 606. For the purpose of this title, the term 'recipient' means—

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

○